

# Trade Remedies: A Primer

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## Summary

The United States and many of its trading partners use laws known as trade remedies to mitigate the adverse impact of various trade practices on domestic industries and workers.

- U.S. antidumping (AD) laws (19 U.S.C. §1673 et seq.) authorize the imposition of duties if (1) the International Trade Administration of the Department of Commerce (ITA) determines that foreign merchandise is being, or likely to be, sold in the United States at less than fair value, and (2) the U.S. International Trade Commission (USITC) determines that an industry in the United States is materially injured or threatened with material injury, or that the establishment of an industry is materially retarded, due to imports of that merchandise.
- U.S. countervailing duty laws (19 U.S.C. §1671 et seq.) authorize the imposition of countervailing duties (CVD) if the ITA finds that the government of a country or any public entity has provided a subsidy on the manufacture, production, or export of the merchandise, and the USITC determines injury or threat thereof.
- U.S. safeguard laws (19 U.S.C. §2251 et seq.) authorize the President to provide temporary import relief from injurious surges of imports resulting from fairly competitive trade from all countries. Other safeguard laws authorize relief for import surges from communist countries (19 U.S.C. §2436) and from China (19 U.S.C. §2451). In each case, the USITC conducts an investigation, forwards recommendations to the President, and the President may act on the USITC's recommendation, modify it, or take no action.

These laws are deemed consistent with U.S. international obligations provided that they conform to the World Trade Organization (WTO) Agreement on Subsidies and Countervailing Measures (ASCM) and the WTO Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade, 1994 (ADA, Antidumping Agreement) agreed to as part of the Uruguay Round of multilateral trade negotiations that established the World Trade Organization (WTO), as well as other trade agreements to which the United States is a party.

In the first session of the 112<sup>th</sup> Congress, legislation was introduced seeking to amend trade remedy statutes, including addressing currency misalignment S. 1619, S. 328, and H.R. 639 in trade remedy investigations. S. 1130 and related bill S. 1267, the Strengthening America's Trade Laws Act, seek, in part, to provide more specific methodology for trade remedy actions in nonmarket economy countries. In the second session, H.R. 4105 seeks to specifically apply countervailing action to nonmarket economy countries in light of a December 19, 2011 decision by the U.S. Court of Appeals for the Federal Circuit that CVD action may not be applied to the imports of such countries. S. 2513, an identical measure, passed in the Senate by unanimous consent on March 5, 2012.

This report discusses, first, congressional interest in trade remedy laws, and describes legislation seeking to amend the laws in the first session of the 112<sup>th</sup> Congress. Second, it describes antidumping and countervailing duty laws, procedures, and investigations. Third, U.S. safeguard statutes and investigative procedures are presented. Finally, an **Appendix** provides a chart outlining briefly all U.S. trade remedy statutes, major actors, and effects of these laws.

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## Introduction

The United States and many of its trading partners use trade remedy laws to lessen the adverse impact of various trade practices on domestic industries, producers, and workers. These laws are deemed consistent with U.S. international obligations provided they conform to the trade remedy provisions agreed to as part of the Uruguay Round of multilateral trade negotiations (1986-1994) and other trade agreements to which the United States is a party. This report will, first, discuss congressional interest in these laws, and give an overview of recent legislation to amend the laws in Congress. Second, it describes AD and CVD laws, procedures and investigations, and provides a statistical overview of existing cases. Third, safeguard statutes and investigations are discussed.

Finally, an **Appendix** provides a chart outlining briefly all U.S. trade remedy statutes, major actors, and remedies presented.

## Overview

The three most frequently applied U.S. trade remedy laws are antidumping, countervailing duty, and safeguards. These laws are enforced primarily through the administrative investigations and actions of two U.S. government agencies: the International Trade Administration of the Department of Commerce (Commerce), and the International Trade Commission (USITC).

*Antidumping* (AD) laws provide relief to domestic industries that have been, or are threatened with, the adverse impact of imports sold in the U.S. market at prices that are shown to be less than fair market value. The relief provided is an additional import duty placed on the dumped imports.

*Countervailing duty* (CVD) laws give a similar kind of relief to domestic industries that have been, or are threatened with, the adverse impact of imported goods that have been subsidized by a foreign government or public entity, and can therefore be sold at lower prices than similar goods produced in the United States. The relief provided is an additional import duty placed on the subsidized imports.

*Safeguard* (also referred to as escape clause) laws give domestic industries relief from import surges of goods that are fairly traded. The most frequently applied safeguard law, Section 201 of the Trade Act of 1974, is designed to give domestic industry the opportunity to adjust to the new competition and remain competitive. The relief provided is generally an additional temporary import duty, a temporary import quota, or a combination of both. Safeguard laws also require presidential action in order for relief to be put into effect.

This report outlines the statutory authority, investigative procedures, and statistical outcomes for (1) U.S. AD and CVD actions, and (2) U.S. safeguard actions. Additional trade remedy laws that also not discussed in this report include Section 337 of the Tariff Act of 1930, as amended, which treats as unlawful imports sold through unfair competition or products infringing U.S. intellectual property rights. Sections 301-310 of the Trade Act of 1974, as amended, give the United States Trade Representative (USTR) authority to enforce U.S. rights under international trade agreements and act against unfair foreign trade practices that burden U.S. trade. Trade Adjustment Assistance (TAA) programs provide readjustment assistance for firms and workers who have suffered due to increased imports due to trade agreements. A brief description of these trade remedy laws appears in an **Appendix** to this report.

## Congressional Interest

Trade remedies have been a focus of much domestic and international debate in recent years. On the domestic front, the preservation of U.S. authority to “enforce rigorously its trade laws” was a major negotiating objective included in presidential Trade Promotion Authority (TPA) in the 107<sup>th</sup> Congress (P.L. 107-210). Many in Congress continue to support this approach.

Some in Congress also assert that the U.S. use of trade remedies is necessary to protect U.S. firms and workers from unfair international competition. Some also credit the existence of trade remedies with helping to increase public support for additional trade liberalization measures. These Members favor increased enforcement of trade remedies. Others in Congress, especially those who represent U.S. importers, manufacturers, or export-oriented businesses, tend to support revisions to the ADA and ASCM in ways that could make use of U.S. trade remedy laws less frequent and relief harder to obtain. For example, some in Congress have supported legislation introduced in previous sessions that would have required administering authorities to determine whether a trade remedy action (such as imposing an AD or CVD duty) is in the overall public interest before such a measure can be implemented.<sup>1</sup>

At the beginning of the World Trade Organization (WTO) Doha Development Agenda (DDA or Doha Round) of multilateral trade negotiations, some WTO member countries were concerned about the intensifying worldwide use of trade remedies since the enactment of the Uruguay Round Agreements in 1995. Developing nations, such as India and South Africa, had begun using trade remedy actions more frequently, while they were previously tools used almost exclusively by developed nations. The increasing international concern led several countries to press for negotiations on changes to the WTO Antidumping (formally known as the *Agreement on Implementation of Article VI*) and Subsidies (*Agreement on Subsidies and Countervailing Measures*) Agreements, despite the efforts of U.S. trade negotiators and some in Congress to keep them off the table. Thus, although the DDA is now at an impasse, if a multilateral trade deal is ultimately reached, possible modifications to the WTO Antidumping and Subsidies agreements (and thus, possible changes in U.S. trade remedy laws) could become focus during congressional consideration.

Some congressional observers also expressed concern when WTO dispute settlement and Appellate Body panels made determinations against two U.S. trade remedy provisions, the Antidumping Act of 1916 and the Continued Dumping and Subsidy Offset Act (CDSOA)—finding that these measures violated U.S. obligations under the WTO.<sup>2</sup> The Antidumping Act of 1916 was repealed in the Miscellaneous Trade and Technical Corrections Act of 2004 (Section 2006 of P.L. 108-429, December 3, 2004). Despite considerable congressional resistance to repealing the CDSOA, it was ultimately repealed in a budget reconciliation bill in 2006 (P.L. 109-171). However, since the repeal allowed disbursements under the act to continue for all goods entering the United States prior to October 1, 2007. Since collection of AD and CVD duties is a retrospective process, some domestic producers and interested parties continue to receive disbursements under the law.

<sup>1</sup> H.R. 1127 in the 110<sup>th</sup> Congress, the American Manufacturing Competitiveness Act, sought to include U.S. industrial users of products subject to AD/CVD investigations as interested parties. The bill also would have required the ITC to weigh harm to industrial users from imposition of AD or CVD actions against the potential benefits to the U.S. domestic industry found to be materially injured or threatened with material injury.

<sup>2</sup> 19 U.S.C. 1675c, P.L. 106-387, Title X. Also known as the Byrd Amendment, the act required that duties collected pursuant to antidumping or countervailing duty orders be distributed annually to “affected domestic producers” for certain qualifying expenditures.

An administrative practice used in AD and CVD investigations known as “zeroing,” (further discussed below) was also challenged in a WTO dispute, and on January 9, 2007, the WTO Appellate Body determined against the United States in a dispute on zeroing. The practice was also successfully challenged in numerous other WTO cases. Since zeroing is an administrative procedure used when calculating the amount of subsidies, some compliance in these disputes may be accomplished without legislative action. The Department of Commerce announced that it would modify its practices in some—but not all—AD/CVD calculations,<sup>3</sup> and began implementing new administrative procedures in some cases in April 2007.<sup>4</sup>

The above WTO determinations, which some in Congress considered adverse to U.S. interests, caused some in Congress to call for greater congressional scrutiny of WTO panel and Appellate Body decisions involving the United States.

## Legislation in the 112<sup>th</sup> Congress

In the first session of the 112<sup>th</sup> Congress, two bills addressed the issue of currency misalignment in AD and CVD cases. First, the Senate passed S. 1619 (introduced September 9, 2011, passed the Senate on September 12, 2011), the Currency Exchange Rate Oversight Reform Act of 2011, which seeks to provide a mechanism for adjusting for currency undervaluation in AD and CVD cases. Second, H.R. 639, The Currency Reform for Fair Trade Act, and related bill S. 328, would amend the Tariff Act of 1930 to clarify that countervailing duties may be imposed to “address subsidies relating to a fundamentally undervalued currency.”

S. 1130 (and related bill S. 1267), the Strengthening America’s Trade Laws Act, seeks to address concerns of some in Congress that the WTO dispute settlement system has “added to the obligations and diminished the rights of WTO members,” particularly with regard to the Antidumping and Subsidies Agreements.

S. 1133 (and related bill H.R. 3057), the Enforcing Orders and Reducing Circumvention and Evasion Act of 2011, seeks to provide a process by which a U.S. domestic industry or other interested party covered by an AD or CVD order could petition U.S. Customs and Border Protection (CBP) to investigate allegations of transshipment of merchandise.

## Countervailing Application to Non-Market Economy (NME) Countries

In the second session, H.R. 4105 seeks to specifically apply countervailing duty laws to non-market economy countries, such as China and Vietnam.<sup>5</sup> The bill also seeks to address a ruling in the Court of International Trade, as well as a similar WTO Appellate body finding that there may be a “double remedy” in situations where CVD and AD actions are simultaneously applied on imports from NME countries.<sup>6</sup> An identical measure, S. 2153, passed the Senate by unanimous consent on March 5, 2012.

<sup>3</sup> 71 *Federal Register* 11189, March 6, 2006; 72 *Federal Register* 1704, January 16, 2007; 72 *Federal Register* 3783, January 26, 2007; Department of Commerce, *Issues and Decision Memorandum for the Final Results of the Section 129 Determination*, April 9, 2007.

<sup>4</sup> Op. cit.

<sup>5</sup> Other NME countries are Armenia, Azerbaijan, Belarus, Georgia, Kyrgyz Republic, Moldova, Tajikistan, and Uzbekistan.

<sup>6</sup> CRS Report RL33976, *U.S. Trade Remedy Laws and Nonmarket Economies: A Legal Overview*, by Jeanne J. Grimmett. World Trade Organization, Appellate Body Report, *United States—Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WT/DS379/AB/R (March 11, 2011). The “double counting”



On December 19, 2011, in a case challenging the imposition of countervailing duties on tires from China (a non-market economy, or NME country), the U.S. Court of Appeals for the Federal Circuit (CAFC) ruled that CVD laws cannot be applied to products from NME countries.<sup>7</sup> The court decision calls into question 23 existing CVD orders in place on products from China and Vietnam that may have to be reversed if the appeals court ruling stands.

This ruling reversed a 2007 ITA determination that, despite a long-standing practice of not conducting CVD investigations on products from NME countries,<sup>8</sup> it was possible to identify subsidies in countries such as China—where market forces actually determine the prices of more than 90% of Chinese products, wages are negotiated (rather than being set by the government), foreign currency is more accessible, and the government acknowledges private ownership rights.<sup>9</sup>

In a letter to the chairmen and ranking members of the Senate Finance and Ways and Means Committees, U.S. Trade Representative Ron Kirk and Commerce Secretary John Bryson indicated that the Administration would pursue all available judicial options, including a rehearing by the entire appellate court.<sup>10</sup> The deadline for petitioning for the review is March 5, 2012.<sup>11</sup> At the same time, they urged Congress to act quickly to “enact legislation clarifying that CVD law can be applied to subsidized goods from non-market economies, that CVD proceedings Commerce has already initiated on products from non-market economies are to continue, and that CVD determinations Commerce has made with respect to such products are to remain in effect.”<sup>12</sup> The letter also indicated that the CVD orders in question cover a wide range of products “in which U.S. manufacturing is most competitive,” (including steel, aluminum, paper, and tires) with a total annual value of \$4.7 billion.<sup>13</sup>

## WTO Negotiations

In the WTO, debate continues on possible multilateral AD and CVD reforms in the Negotiating Committee on Rules as part of the continuing WTO Doha Round of multilateral negotiations

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issue was also raised in the Court of International Trade decision in the GPX case, *GPX Int'l Tire Corp. v. United States*, 715 F.Supp.2d 1337 (Ct. Int'l Trade 2010). The use of double remedies by DOC on goods from China has also been challenged in a second case, *Guang Ya Aluminum Industries Co., Ltd. v. United States*, No. 11-00197 (Ct. Int'l Trade filed June 20, 2011).

<sup>7</sup> CRS Report RL33976, *U.S. Trade Remedy Laws and Nonmarket Economies: A Legal Overview*, by Jeanne J. Grimmett. See also *GPX Int'l Tire Corp. v. United States*, 715 F.Supp.2d 1337 (Ct. Int'l Trade 2010)[hereinafter GPX II]. The use of double remedies by DOC on goods from China has also been challenged in a second case, *Guang Ya Aluminum Industries Co., Ltd. v. United States*, No. 11-00197 (Ct. Int'l Trade filed June 20, 2011). For more information on this case, see CRS Report RL32014, *WTO Dispute Settlement: Status of U.S. Compliance in Pending Cases*, by Jeanne J. Grimmett, p. 57.

<sup>8</sup> The ITA had originally determined in 1983 that it was unable to apply CVD laws to NME countries because it was unable to identify subsidies in countries in which central planners set prices without regard to market conditions. This determination was upheld in *Georgetown Steel Corp. v. United States* (801 F.2d 1308 (Fed. Cir. 1986)). Thus, the ITA did not conduct CVD investigations on products from NME countries until the 2007 decision.

<sup>9</sup> Department of Commerce, International Trade Administration. “Countervailing Duty Investigation of Coated Free Sheet Paper from the People’s Republic of China—Whether the Analytical Elements of the Georgetown Steel Opinion are Applicable to China’s Present-Day Economy.” Memorandum, March 29, 2007.

<sup>10</sup> Letter to Hon. Max Baucus, Chairman, Senate Committee on Finance, from John Bryson, Secretary of Commerce, and Ron Kirk, U.S. Trade Representative, at <http://insidetrade.com>; “Kirk, Bryson Urge Congress to Fix GPX Decision in Parallel to Judicial Review,” *Inside U.S. Trade*, January 20, 2012.

<sup>11</sup> Case Summary, U.S. Court of Appeals for the Federal Circuit, *GPX Int'l Tire Corp. v. United States*, No. 2011-1107, Motions and Other Entries, Entry 127, filed January 24, 2012.

<sup>12</sup> *Ibid.*

<sup>13</sup> *Ibid.*



launched in 2001. Any negotiations seeking to amend the WTO agreements on trade remedies take place in the Negotiating Committee on Rules. One of the negotiating objectives in the Doha Round called for “clarifying and improving disciplines” under the WTO Antidumping and Subsidies Agreements. The frequent use of trade remedies by the United States and other developed nations—and increasingly, developing countries—had come under criticism by some WTO members as being protectionist, and some countries favored reforming these agreements as an essential objective of the negotiations.

The latest draft texts of proposed changes to the WTO Antidumping and Subsidies Agreements were issued in April 2011 by the chairman of the Negotiating Committee on Rules.<sup>14</sup> The proposed revisions, along with draft texts presented on December 2008, were based on the written submissions of WTO members and have served as the basis for negotiations since that time.

## AD and CVD Laws and Investigations

### U.S. Statutes

Statutory authority for AD investigations and remedial actions is found in Subtitle B of Title VII of the Tariff Act of 1930, as added by the Trade Agreements Act of 1979, and as subsequently amended. The law permits the imposition of antidumping duties if (1) the International Trade Administration of the Department of Commerce (ITA) determines that the foreign subject merchandise is being, or likely to be, sold in the United States at less than fair value; and (2) the U.S. International Trade Commission (USITC) determines that an industry in the United States is materially injured or threatened with material injury,<sup>15</sup> or that the establishment of an industry is materially retarded, by reason of imports of that merchandise.<sup>16</sup>

Statutory authority for CVD investigations is found in Subtitle A of Title VII of the Tariff Act of 1930,<sup>17</sup> as added by the Trade Agreements Act of 1979, and as subsequently amended. The statute provides that countervailing duties will be imposed, first, when The ITA determines that the government of a country or any public entity within the territory of a country is providing, directly or indirectly, a countervailable subsidy with respect to the manufacture, production, or export of the subject merchandise that is imported or sold (or likely to be sold) for importation into the United States. Second, in the case of a country that is party to the WTO Subsidies Agreement, that has assumed similar obligations with respect to the United States, or that has entered into certain other agreements with the United States, the USITC must determine that a domestic industry is materially injured or threatened with material injury, or that the establishment of a domestic industry is materially retarded, by reason of imports of that merchandise.<sup>18</sup>

<sup>14</sup> World Trade Organization. Negotiating Group on Rules. *Communication from the Chairman*, TN/RL/W/254, April 21, 2011. See also World Trade Organization, Negotiating Group on Rules, *New Draft Consolidated Chair Text of the AD and SCM Agreements*, TN/RL/W/236, December 19, 2008.

<sup>15</sup> “Material injury” is defined in 19 U.S.C. 1677(7) as “harm which is not inconsequential, immaterial, or unimportant.”

<sup>16</sup> 19 U.S.C. §1671.

<sup>17</sup> 19 U.S.C. §1671 *et seq.*

<sup>18</sup> *Ibid.*

## Petition and Eligibility

AD and CVD investigations are conducted on the basis of a petition filed simultaneously with the USITC and the ITA on behalf of a domestic industry, or by the ITA on its own initiative.<sup>19</sup>

Industry representatives may include domestic manufacturers, producers, or wholesalers of a product like the investigated imports, unions, other groups of workers, trade associations or other associations of manufacturers, producers or wholesalers. Petitioners may allege (1) a subsidy (CVD petition), (2) sales at less than fair value (AD petition), or (3) that both conditions exist.<sup>20</sup>

If an investigation is initiated by petition, the ITA must determine within 20 days (1) whether the petition accurately alleges the existence of dumping or subsidies, (2) whether there is enough information in the petition to support the investigation, and (3) whether the petition has been filed by or on behalf of an industry.<sup>21</sup> If the ITA's determination at this stage is negative, the petition is dismissed and the proceedings end.<sup>22</sup>

## U.S. International Obligations

Disciplines regulating the use of antidumping laws appear in Article VI of the General Agreements on Tariffs and Trade (GATT, the predecessor to the WTO) and in the Antidumping Agreement adopted in the Uruguay Round (1986-1994) of multilateral trade negotiations that established the WTO. The Uruguay Round Antidumping Agreement outlines requirements regarding procedures to be used in antidumping investigations and the implementation and duration of AD measures.

Article XVI of the GATT and the Subsidies Agreement negotiated during the Uruguay Round regulate the use of subsidies and countervailing measures. The Subsidies Agreement defines the term "subsidy" as a financial contribution by a government or public body within the territory of a WTO member, which confers a benefit. The Agreement identifies three categories of subsidies: (1) prohibited subsidies, (2) actionable subsidies, and (3) non-actionable subsidies. To be covered by the Subsidies Agreement, subsidies also need to be specific to an industry, except that prohibited subsidies (i.e., export subsidies and import substitution subsidies) are considered *per se* specific.<sup>23</sup> The Subsidies Agreement also provides transitional rules for developed countries and countries in transition to a market economy, as well as special and differential treatment rules for developing countries.

Other trade agreements that the United States has adopted include specific AD and CVD articles. For example, article 1902 of the North American Free Trade Agreement (NAFTA) states that each party to the agreement reserves the right to apply its antidumping and countervailing duty laws to any other party. The right of parties to change or modify these laws is also retained, provided the

<sup>19</sup> CVD: 19 U.S.C. §1671a(a); AD: 19 U.S.C. 1673a(a).

<sup>20</sup> CVD: 19 U.S.C. §1671a(b)(1); AD: 19 U.S.C. §1673a(b)(1). Both citations refer to a definition of "interested party" found in subparagraphs (C),(D),(E),(F), or (G) of 19 U.S.C. §1677(9).

<sup>21</sup> As a general rule, Commerce determines that a petition has been filed on behalf of an industry if (1) the domestic producers or workers supporting the petition account for at least 25% of the production of the domestic like product, or (2) the domestic producers or workers who support the petition account for more than 50% of the domestic like product produced by that portion of the industry expressing support for or opposition to the petition (CVD:19 U.S.C. §1671a(c)(4)(A); AD: 19 U.S.C. §1673a(c)(4)(A)). The statute allows for an extension of the 20-day time period (to 40 days) if Commerce determines that the petition does not establish sufficient industry support and must poll or survey the industry in order to determine adequate support for the petition.

<sup>22</sup> CVD: 19 U.S.C. §1671a(c)(3); AD 19 U.S.C. §1673a(c)(3).

<sup>23</sup> The non-actionable subsidies category was applied provisionally for five years ending December 31, 1999 and was not extended.

amending statute specifically states that the amendment applies to the other NAFTA parties; the other parties are notified; and the changes are either consistent with the GATT and WTO agreements, or the object and purpose of the NAFTA and its AD and CVD chapter. Articles 1903 and 1904 allow a review of statutory amendments and a review of final AD and CVD determinations by a bi-national panel. The Agreement also puts a consultation and dispute settlement system in place so that other parties to the agreement may challenge statutory changes. In addition, final determinations in AD and CVD cases may be subject to bi-national panel review.

## AD and CVD Investigations

Although antidumping and countervailing duty laws address fundamentally different forms of unfair trade behavior, the remedies provided (a duty reflecting the “dumping margin” or amount of subsidy), the investigation processes, and the economic effects of the actions are similar. In some cases, AD and CVD investigations are also conducted simultaneously on a targeted product. Therefore, for purposes of this report, the investigation of AD and CVD petitions will be addressed together.

Prior to the imposition of an AD or CVD order, the ITA and the USITC conduct a detailed investigative process. Some political economists who oppose this type of import relief have pointed out that the administrative nature of AD and CVD investigations makes it easier to institute “protectionist” measures. They maintain that the laws delegate the investigation and imposition of duties to administrative agencies so that the decisions (and possible negative political fallout) are removed from the President and Congress.<sup>24</sup> In addition, since a certain amount of prior knowledge is necessary in order to follow the procedure, the process is engineered so that it does not lend itself to close public or media scrutiny.<sup>25</sup> Some analysts have also criticized the administrative agencies (particularly the ITA) for administering investigations in such a way that they are biased in favor of domestic industries.<sup>26</sup>

Supporters of trade remedies point out that current AD and CVD procedures have been worked out through painful and difficult multilateral trade negotiations, and that this is one of the reasons that the investigative procedure is so detailed. Furthermore, supporters maintain that the process is detailed because investigations must be transparent and provide a voice for all parties concerned.<sup>27</sup>

## Preliminary Determinations

As soon as a petition is filed, the USITC begins to investigate whether there is a reasonable indication of injury. If the USITC’s preliminary determination is negative, or the USITC determines those imports of the subject merchandise are negligible, the proceedings end.<sup>28</sup> The USITC must, in most circumstances, make its preliminary determination within 45 days after a petition is filed or an investigation is begun by the ITA on its own initiative.<sup>29</sup>

<sup>24</sup> Finger, J.M.; Hall, H. Keith; Nelson, Douglas R. “The Political Economy of Administered Protection,” *American Economic Review*, 72:3 (June 1982), p. 452.

<sup>25</sup> Ibid.

<sup>26</sup> Ibid.

<sup>27</sup> Mastel, Greg. *Antidumping Laws and the U.S. Economy*, New York: Economic Strategy Institute, 1998, p. 103.

<sup>28</sup> CVD: 19 U.S.C. §1671b(a)(1); AD: 19 U.S.C. §1673b(a)(1).

<sup>29</sup> CVD: 19 U.S.C. §1671b(a)(2); AD: 19 U.S.C. §1673b(a)(2). In cases that Commerce has taken extra steps to

If the USITC's preliminary determination is affirmative, the ITA begins its preliminary investigation to determine whether the alleged unfair practice exists. In CVD cases, the ITA has 65 days to make a preliminary determination, or 130 days at the petitioner's request or if the ITA determines that the case is extraordinarily complicated.<sup>30</sup> In AD cases, the ITA must make its determination within 140 days, or within 190 days at the petitioner's request or if the case is extraordinarily complicated.<sup>31</sup>

If the ITA determines preliminarily in the affirmative, it also estimates a subsidy margin (CVD) or a weighted-average dumping margin (AD) for each exporter or producer individually investigated, and an "all-others rate" for all other exporters.<sup>32</sup> the ITA then orders the U.S. Customs and Border Protection (CBP) to delay the final computation of all duties on imports of the targeted merchandise (suspend liquidation) until the case is resolved and to require the posting of cash deposits, bonds, or other appropriate securities to cover the duties (plus the estimated dumping or subsidy margin) for each subsequent entry into the U.S. market.

If the ITA's determination is negative, the ITA continues the investigation to the final stage and the USITC also continues its investigation.<sup>33</sup>

## Final Determinations

In CVD investigations, the ITA generally makes its final determination within 75 days after the date of its preliminary determination.<sup>34</sup> In AD cases, the ITA's final determination must be made within 75 days after the preliminary determination, or within 135 days at the request of exporters (if the preliminary determination was affirmative) or at the request of the petitioner (if the preliminary determination was negative).<sup>35</sup> Before issuing a final determination, the ITA must hold a hearing upon request of any party to the proceeding.<sup>36</sup>

If the ITA's final determination is negative, the proceedings end, and any suspension of liquidation is terminated, bonds and other securities are released, and deposits are refunded.<sup>37</sup> If the ITA's final determination is affirmative, it orders the suspension of liquidation if it has not already done so.<sup>38</sup>

If the ITA's final determination is affirmative, the investigation continues to the final injury phase at the USITC. The USITC must make its final determination: (a), within 120 days of the ITA's preliminary affirmative determination; or (b), within 45 days of an affirmative final determination by the ITA, whichever is later. If the ITA's preliminary determination was negative and its final

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determine industry support, the ITC has 25 days from the time it is notified of Commerce's initiation to make a preliminary determination.

<sup>30</sup> 19 U.S.C. §1671b(b) and (c).

<sup>31</sup> 19 U.S.C. §1673b(b) and (c). Expedited time lines are provided for Commerce to make its preliminary determination for short life cycle merchandise when manufacturers shown to be repeat offenders.

<sup>32</sup> CVD: 19 U.S.C. §1671b(d); AD 19 U.S.C. §1673b(d).

<sup>33</sup> Commerce: 19 C.F.R. §351.205; ITC: 19 C.F.R. §207.20

<sup>34</sup> 19 U.S.C. §1671d(a)(1). If a CVD investigation is being conducted concurrently with an AD investigation, the CVD determination can be extended (if requested by the petitioner) to the date of the final determination of the AD case.

<sup>35</sup> 19 U.S.C. §1673d(a).

<sup>36</sup> 19 C.F.R. §351.310.

<sup>37</sup> CVD: 19 U.S.C. §1671d(c)(2); AD: 19 U.S.C. §1673(c)(2).

<sup>38</sup> CVD: 19 U.S.C. §1671d(c)(1)(C); AD: 19 U.S.C. §1673d(c)(1)(C). Commerce would not suspend liquidation if its preliminary determination were negative.

determination was affirmative, the USITC's determination must be made within 75 days of the ITA's affirmative final determination.<sup>39</sup> The USITC also holds hearings prior to making its final determination.<sup>40</sup>

If the final determination of the USITC is affirmative, the ITA issues a countervailing or antidumping duty order within seven days of notification of the USITC's decision. The duty imposed is equal to the net subsidy or dumping margin calculated by the ITA. If the final determination of the USITC is negative, no AD or CVD duties are imposed, any suspension of liquidation is terminated, bonds or other securities are released, and deposits are refunded.<sup>41</sup>

## Critical Circumstances

If a petitioner alleges that critical circumstances exist in an AD or CVD case, an extra step in the investigation is required. In CVD cases, the ITA must promptly determine whether there is a reasonable basis to expect that the alleged subsidy is inconsistent with the WTO Subsidies Agreement and that massive imports of the subject merchandise have occurred over a relatively short period.<sup>42</sup> In AD cases, the ITA determines whether: (1), there is a reasonable basis to suspect that there is a history of dumping (combined with material injury due to the imports), or that the importer knew or should have known that the exporter was selling the merchandise at less than fair value, and also knew that there was likely to be material injury due to the sales; and (2), whether massive imports of the merchandise have occurred over a relatively short period.<sup>43</sup> If the ITA makes an affirmative critical circumstances finding, it extends the suspension of liquidation of any unliquidated entries of merchandise into the United States retroactively to 90 days before the suspension of liquidation was first ordered.<sup>44</sup>

Whether or not the ITA's initial critical circumstances determination is affirmative, if its final determination on subsidies or dumping is affirmative, the ITA includes within its overall final determination an additional determination on critical circumstances. If the final determination on critical circumstances is affirmative, retroactive duties, if not yet ordered, are ordered on unliquidated entries at this time.<sup>45</sup> If the critical circumstances determination is negative, all retroactive suspension of liquidation is terminated, and bonds, securities, or cash deposits related to the retroactive action are released.<sup>46</sup>

If the ITA makes an affirmative determination of critical circumstances, the USITC's final determination must include a finding as to whether the subject imports are likely to undermine seriously the remedial effect of the AD or CVD order.<sup>47</sup> If both the USITC and the ITA make affirmative critical circumstances determinations, any AD or CVD duty order applies to the goods for which the retroactive suspension of liquidation was ordered.<sup>48</sup> If the final critical

<sup>39</sup> CVD: 19 U.S.C. §1671d(b)(2) and (3); AD: 19 U.S.C. §1673d(b)(2) and (3).

<sup>40</sup> 19 C.F.R. §207.24.

<sup>41</sup> CVD: 19 U.S.C. §1671e(a); AD: 19 U.S.C. §1673e(a).

<sup>42</sup> 19 U.S.C. §1671b(e)(1).

<sup>43</sup> 19 U.S.C. §1673b(e)(1).

<sup>44</sup> CVD: 19 U.S.C. §1671b(e)(2); AD: 19 U.S.C. §1673b(e)(2).

<sup>45</sup> CVD: 19 U.S.C. §1671d(c)(4); AD: 19 U.S.C. §1673d(c)(4).

<sup>46</sup> CVD: 19 U.S.C. §1671d(b)(3); AD: 19 U.S.C. §1673d(b)(3).

<sup>47</sup> CVD: 19 U.S.C. §1671d(b)(4); AD: 19 U.S.C. §1673d(b)(4).

<sup>48</sup> CVD: 19 U.S.C. §1671d(c)(4); AD: 19 U.S.C. §1673d(c)(4).

circumstances determination of either agency is negative, any retroactive suspension of liquidation is terminated, bonds and securities are released, and any cash deposits are refunded.<sup>49</sup>

## Termination of Investigation and Suspension Agreements

the ITA may terminate or suspend antidumping or countervailing duty proceedings at any point in favor of an alternative agreement with the foreign government (in the case of subsidies) or the exporters (in the case of dumping).

the ITA or the USITC may terminate an investigation if the petitioner withdraws the petition, or the ITA may terminate an investigation it initiated.<sup>50</sup> the ITA may also terminate an investigation in favor of accepting an agreement with the foreign government (CVD) or exporters (AD) to limit the volume of imports (“quantitative restriction agreements”).<sup>51</sup> the ITA must be satisfied that the agreement is in the public interest. Public interest factors include (1) a finding that the imposition of duties would have a greater adverse impact on U.S. consumers than an alternative agreement; (2) an assessment of the relative economic impact on U.S. international economic interests; and (3) a consideration of the relative impact of such an agreement on the domestic industry producing like merchandise.<sup>52</sup>

the ITA may suspend an investigation if (1) the government of the country alleged to be providing the subsidy, or the exporters accounting for substantially all of the subject merchandise agree to eliminate the subsidy or dumping margin, to offset the net subsidy completely, or to cease exports of the subject merchandise into the United States within six months of the suspension of the investigation; (2) if there are extraordinary circumstances<sup>53</sup> and the government or exporters agree to take action that will completely eliminate the injurious effect of the subject imports (including a quantitative restriction agreement with a foreign government); or (3) the agreement concerns alleged sales at less than fair value from a nonmarket economy country and that country agrees to restrict exports of its merchandise into the United States.<sup>54</sup> Before suspending an investigation, the ITA must be satisfied that the suspension is in the public interest and that the agreement can be effectively monitored by the United States.<sup>55</sup>

## Administrative and Sunset Reviews

Each year, during the anniversary month of the publication of an AD or CVD duty order, any interested party may request an administrative review of the order. the ITA may also self-initiate a review. If none of the interested parties request a review, and if there is no objection, the review may be deferred for an additional year. During the review process, the ITA recalculates the amount of the net subsidy or dumping margin and may adjust the amount of AD or CVD duties on the subject merchandise. Suspension agreements are also monitored for compliance and reviewed in a similar fashion. the ITA must make a preliminary determination in CVD

<sup>49</sup> CVD: 19 U.S.C. §1671d(c)(3); 19 U.S.C. §1673d (c)(3).

<sup>50</sup> CVD: 19 U.S.C. §1671c(a)(1); AD: 19 U.S.C. §1671c(a)(1). According to 19 U.S.C. §1671c(a)(3) and 19 U.S.C. §1673c(a)(3), the ITC may not terminate an investigation until a preliminary determination is made by Commerce.

<sup>51</sup> CVD: 19 U.S.C. §1671c(a)(2)(A); AD: 19 U.S.C. §1673c(a)(2)(A).

<sup>52</sup> CVD: 19 U.S.C. §1671c(a)(2)(B) ; AD: 19 U.S.C. §1673c(a)(2)(B).

<sup>53</sup> “Extraordinary circumstances” are described in 19 U.S.C. §1671c(c)(4)(A) and 19 U.S.C. §1673c(c)(2)(A) as circumstances in which “(i) the suspension of an investigation will be more beneficial to the domestic industry than continuation of the investigation, and (ii) the investigation is complex.”

<sup>54</sup> CVD: 19 U.S.C. §1671c(b) and (c); AD: 19 U.S.C. §1673c(b) and (c).

<sup>55</sup> CVD: 19 U.S.C. §1671c(d); AD: 19 U.S.C. §1673c(d).



administrative reviews within 120 (or 180 days if the 120 day deadline is not practicable), and a final determination within 245 days (which may be extended up to 365 days). Preliminary determinations in AD reviews must be made in 90-150 days, and final determinations in 180-300 days.<sup>56</sup>

Administrative reviews are also mandated under certain circumstances by the WTO Antidumping and Subsidies Agreements. Article 11.2 of the Antidumping Agreement and Article 21.2 of the Subsidies Agreement require authorities to periodically review the need for continued imposition of duties, where warranted. Authorities must also conduct examinations at the request of interested parties to examine whether the continued imposition of the duties are necessary to offset the dumping or subsidies, and whether the injury would be likely to continue or recur if the duty were removed, or varied, or both.

### *Changed Circumstances Review*

An interested party may also request a “changed circumstances” review at any time. In this case, the ITA must determine within 45 days whether or not to conduct the review. If the ITA decides that there is good cause to conduct the review, the results must be issued within 270 days of initiation, or within 45 days of initiation if all interested parties agree to the outcome of the review.<sup>57</sup>

### *“New Shipper” Reviews*

If the ITA receives a request from an exporter or producer of merchandise subject to an AD or CVD order who (1) did not export the subject merchandise during the initial period of investigation and (2) was not affiliated with any producer or exporter who did, it must conduct a review to establish an individual AD or CVD rate for that exporter or producer.<sup>58</sup> A preliminary determination in a new shipper review may take up to 180 days (or up to 300 days if “extraordinarily complicated”). Final determinations of the duty rate may take from 90 to 150 days, depending on complexity.<sup>59</sup>

While the new shipper review is being conducted, the ITA is required to direct CBP to allow (at the option of the importer) the posting of a bond or security in lieu of a cash deposit for each shipment of merchandise entering the United States until the review is completed and the AD or CVD rate is established. Some U.S. producers complained that Customs had difficulty collecting the actual amount of AD/CV duties owed on subject merchandise, and have cited the new shipper bonding privilege as a “loophole” that importers exploit in order to circumvent the duties. For example, Louisiana crawfish producers estimated, and Customs confirmed, that between 2002 and 2004, Customs collected only \$25.5 million of about \$195.5 million in AD duties owed on crawfish. A March 2008 report by the U.S. Government Accountability Office (GAO) estimated that abuse of the new shipper bonding privilege was responsible for about 40% of the uncollected duties from fiscal years 2001 to 2007.<sup>60</sup>

<sup>56</sup> 19 U.S.C. §1675 and 19 C.F.R. §351.213.

<sup>57</sup> 19 U.S.C. §1675(b).

<sup>58</sup> 19 U.S.C. §1675(a)(2)(B). In investigations of non-market economy countries, an individual rate is established only if the exporter or producer is able to provide sufficient evidence that government controls over the decision-making process on export-related investment, pricing, and output do not exist.

<sup>59</sup> 19 U.S.C. §1675(a)(2)(B).

<sup>60</sup> Government Accountability Office (GAO), *Antidumping and Countervailing Duties: Congress and Agencies Should Take Additional Steps to Reduce Substantial Shortfalls in Duty Collection*. GAO-08-391, March 2008, p. 13.



Language seeking to suspend new shipper bonding privilege was inserted, along with other trade provisions, into H.R. 4, the Pension Protection Act of 2006 (Boehner). As enacted, the provision suspended the new shipper bonding privilege from April 1, 2006, to June 30, 2009 (Section 1632 of P.L. 109-280). This provision has since expired, and has not been renewed.

### *Sunset Reviews*

Before passage of the Uruguay Round Agreements Act (P.L. 103-465, URAA), AD and CVD orders had no set termination date, and generally were revoked only if the ITA determined through three consecutive annual administrative reviews that no dumping or subsidies had occurred. Currently, sunset reviews must be conducted on each AD or CVD order no later than once every five years.<sup>61</sup> the ITA determines whether dumping or subsidies would be likely to continue or resume if an order were to be revoked or a suspension agreement terminated, and the USITC conducts a similar review to determine whether injury to the domestic industry would be likely to continue or resume. If both determinations are affirmative, the duty or suspension agreement remains in place. If either determination is negative, the order is revoked, or the suspension agreement is terminated.<sup>62</sup> Sunset reviews are required in the WTO Antidumping (Article 11.3) and Subsidies (Article 21.3) Agreements.

## **Outcome of AD and CVD Investigations**

**Table 1** lists the possible outcomes of AD/CVD investigations. From 1980-2008, there were 1,632 AD or CVD cases with final dispositions during FY1980-FY2008 (1158 AD, 474 CVD).<sup>63</sup> Of the 1158 AD investigations, 63 were withdrawn or terminated before the preliminary USITC determination—probably because the proposed investigation did not meet the criteria for initiation due to inadequate information or insufficient injury support.<sup>64</sup> 193 AD cases received a negative preliminary determination from the USITC, meaning that the investigations were terminated. 156 AD cases were terminated between the affirmative USITC determination and the final USITC determination (because they were withdrawn by the petitioner, the ITA declined to initiate an investigation, or the ITA found no evidence of dumping). The USITC made a negative final determination in 241 investigations (investigations were terminated), and 505 affirmative determinations (investigation results in the ITA issuing an AD order).

Of the 474 CVD cases with final determinations during the time period, 54 were terminated before the USITC preliminary determination, 89 had a negative preliminary USITC determination, and 88 were terminated or withdrawn between the preliminary and final USITC determinations. Of those reaching the final stage at the USITC, 111 had a negative final determination, and 132 received an affirmative final determination.

**Table 1. Disposition of AD and CVD Investigations, FY1980-FY2008**

Outcome	Number	Percent
<b>Antidumping Investigations: Total Cases</b>	1158	100%
Terminated before USITC preliminary determination	63	5%

<sup>61</sup> 19 U.S.C. §1675(c).

<sup>62</sup> 19 C.F.R. §351.218.

<sup>63</sup> United States International Trade Commission, *Import Injury Investigations Case Statistics (FY1980-2008)*, February 2010, p. 3.

<sup>64</sup> Ibid.

Outcome	Number	Percent
Negative Preliminary USITC determination (investigation terminated)	193	17%
Terminated between USITC preliminary investigation and final investigation determination (includes cases where petition was withdrawn or the ITA did not initiate an investigation)	156	13%
Negative Final USITC determination (investigation terminated)	241	21%
Affirmative Final USITC determination (AD order Issued by the ITA)	505	44%
<b>Countervailing Investigations: Total Cases</b>	<b>474</b>	<b>100%</b>
Terminated before USITC preliminary determination	54	11%
Negative Preliminary USITC determination (investigation terminated)	89	19%
Terminated after an affirmative preliminary USITC determination but before a final USITC determination (includes cases where petition was withdrawn or the ITA did not initiate an investigation)	88	19%
Negative Final USITC determination (investigation terminated)	111	23%
Affirmative Final USITC determination (Countervailing Duty order issued by the ITA)	132	28%

**Source:** U.S. International Trade Commission, *Import Injury Investigations Case Statistics (Fiscal Years 1980-2008)*, February 2010.

## AD and CVD Duty Orders by Product Group

According to USITC statistics, as of July 2011, there were a total of 306 duty orders in place—258 AD and 48 CVD. **Figure 1** illustrates AD and CVD orders in effect as of that date by product category.

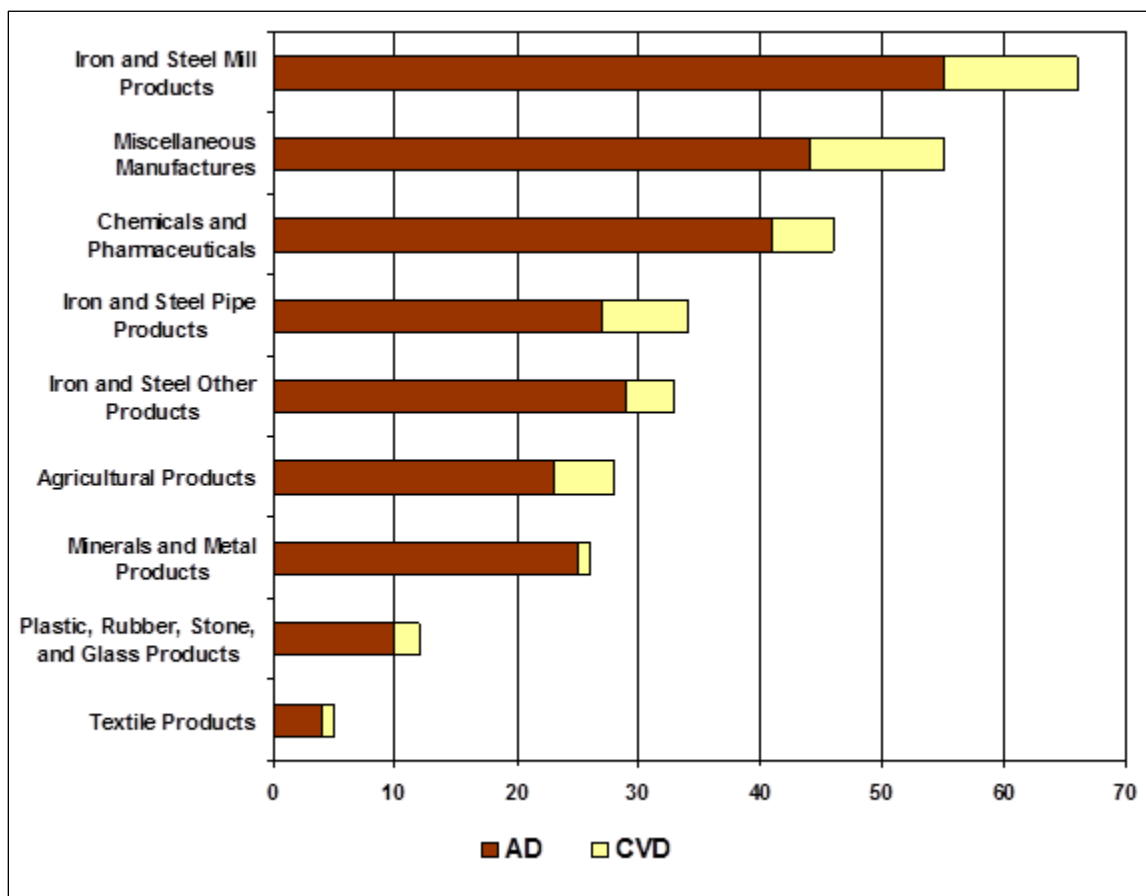
The largest product group subject to AD/CVD orders is steel mill products including stainless steel bar, wire rod, plate, sheet and strip; carbon steel plate; hot-rolled carbon steel flat products, steel and concrete reinforcing bar. These products account for 66 orders currently in force (55 AD, 11 CVD). Iron and steel pipe products (including oil country tubular goods and light-walled rectangular pipe and tube) are second, accounting for 34 orders (29 AD, 4 CVD). Other iron and steel products (including ball bearings, stainless steel butt-weld pipe fittings, steel nails, and steel wire garment hangers) account for a total of 33 orders (29 AD, 4 CVD). According to USITC calculations, products made of iron and steel account for approximately 44 percent of all AD and CVD orders.<sup>65</sup>

Various miscellaneous manufactured items, including wooden bedroom furniture, certain types of coated paper, raw flexible magnets, wooden bedroom furniture, and hand tools, account for about 18% of all orders currently in force (43 AD, 11 CVD). Competing imports of chemicals and pharmaceuticals come next, such as solid urea, saccharin, and citric acid. This group accounts for about 15% (41 AD, 6 CVD) of all current AD and CVD orders.

Agricultural products make up about 9% of current orders (23 AD, 9 CVD). These products include honey, pasta, preserved mushrooms, shrimp, crawfish tail meat, and pistachios. Minerals and metals also account for about 9% (25 AD, 1 CVD), including aluminum extrusions, brass sheet and strip, and magnesium.

<sup>65</sup> U.S. International Trade Commission. *Import Injury Investigations Case Statistics (Fiscal Years 1980-2008)*, February 2010.

**Figure 1. U.S. Trade Remedy Orders by Product Group**  
(As of July 2011)



Source: U.S. International Trade Commission.

Compared to these categories, there are relatively few AD or CVD orders in other product groups, such as in the plastic, rubber stone, glass (4%); textiles and apparel (one AD order); transportation and other machinery equipment (0% as of this writing); or in the electronics and communications categories (0% as of this writing). However, in the past few years there have been some high-profile trade remedy investigations of certain imports of these items, such new pneumatic off-the-road tires and polyethylene retail carrier bags in the plastics and rubber product category.

### Orders by Country

The United States has AD and CVD orders currently in effect for products from 42 countries.

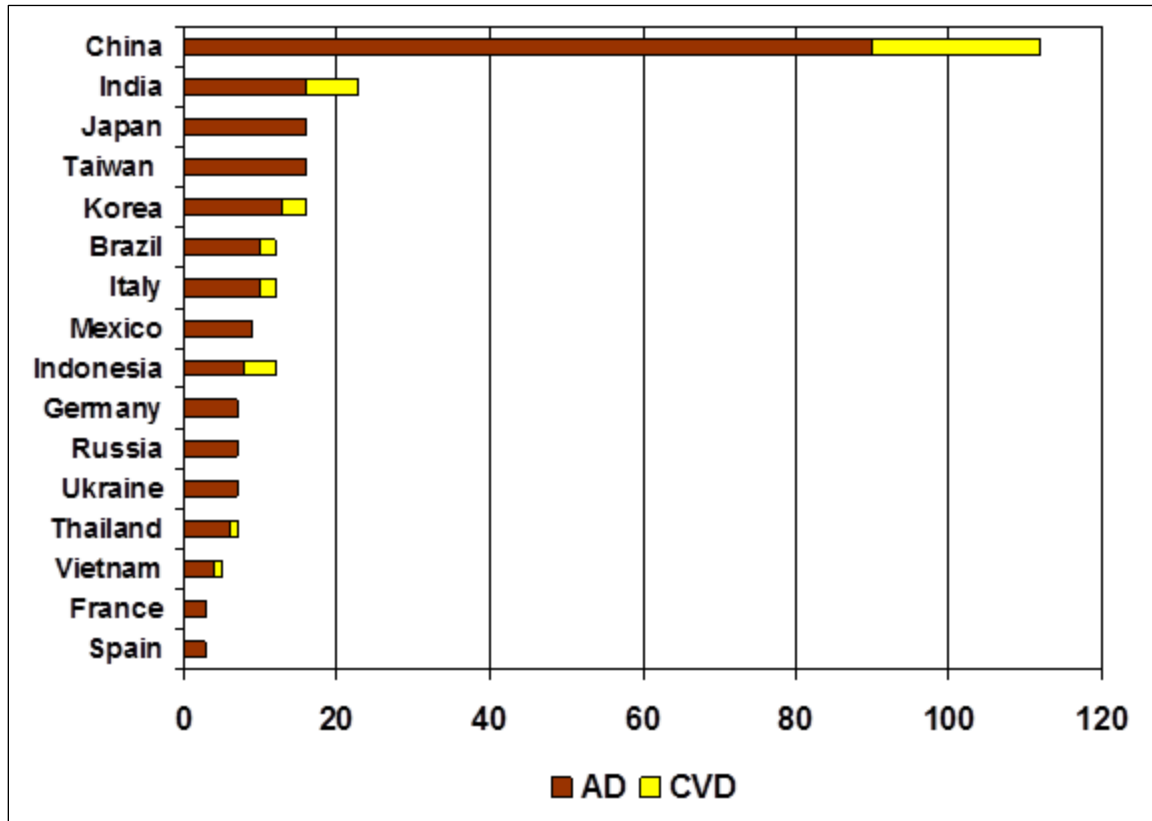
**Figure 2** shows the leading country targets of AD and CVD duty orders in effect as of July 2011.<sup>66</sup> According to USITC data, products from China lead this group with 90 AD orders and 22 CVD orders; followed by the India with 16 AD orders and 7 CVD orders; Japan (16 AD orders); Taiwan (16 AD orders); South Korea (13 AD orders, 3 CVD orders); Brazil (10 AD orders, 2 CVD orders); Italy (10 AD orders, 2 CVD orders); Indonesia (8 AD orders, 4 CVD orders); Mexico (9 AD orders); Russia (7 AD orders); Ukraine (7 AD orders); Thailand (6 AD orders, 1 CVD order); Germany (7 AD orders); Vietnam (4 AD orders, 1 CVD order); and Turkey

<sup>66</sup> U.S. International Trade Commission. *Antidumping and Countervailing Duty Orders in place as of July 7, 2011*, Excel spreadsheet, [http://www.usitc.gov/trade\\_remedy/documents/orders.xls](http://www.usitc.gov/trade_remedy/documents/orders.xls).

(3 AD orders, 2 CVD orders). The actual number of antidumping and countervailing duty orders in effect changes frequently due to administrative and sunset review processes as well as ongoing investigations.

**Figure 2. AD and CVD Orders by Country**

(As of July 2011)



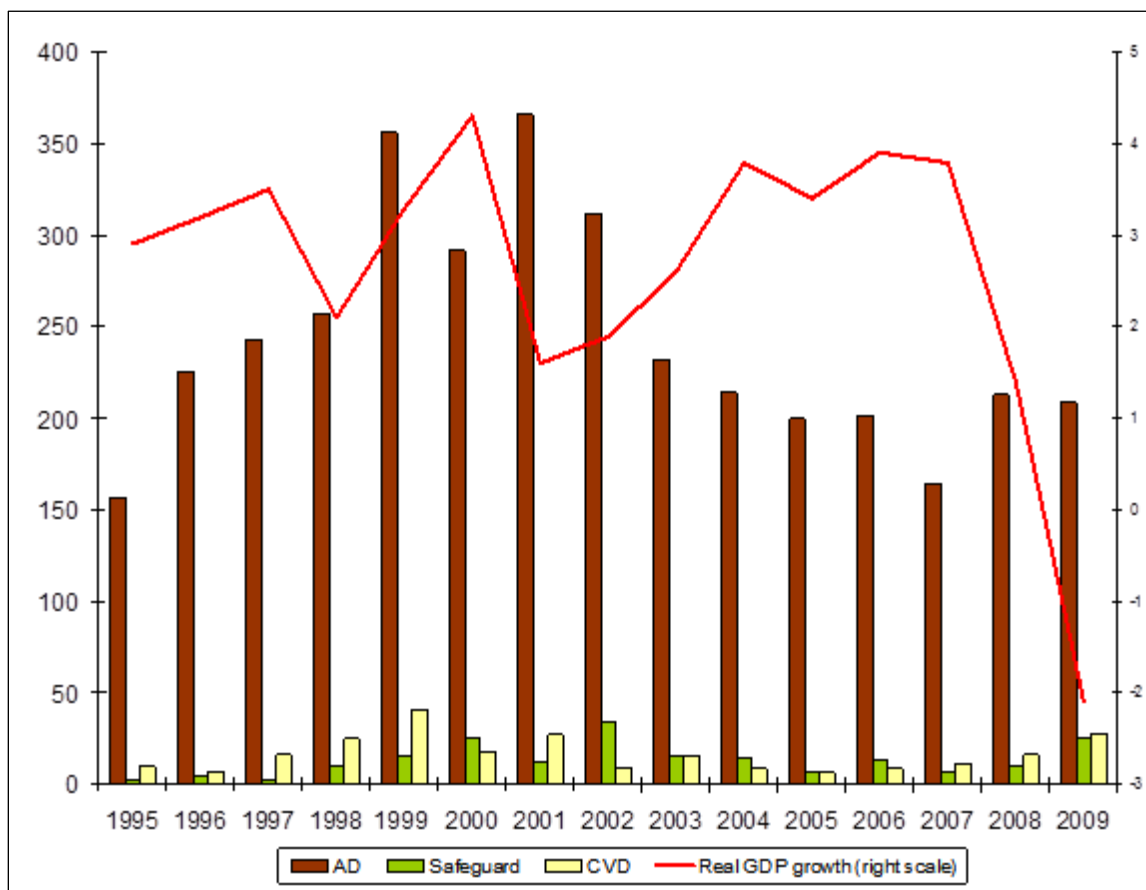
Source: U.S. International Trade Commission.

## Worldwide Trade Remedy Initiations

**Figure 3** illustrates worldwide AD and CVD *initiations* (meaning that petitions have been introduced but that investigations may or may not have been carried out or implemented) from 1980-2008. Initiations peaked in 2001, but then began a steady decline until they rose once again in 2008 (possibly as a response to the global financial crisis).

One reason for the downward trend in 2003-2007 could be increasing globalization. For example, many U.S. domestic manufacturers now import at least some portion of their product lines from overseas, thus possibly reducing their interest in bringing trade remedy cases.

**Figure 3. Worldwide Trade Remedy Initiations and World GDP Growth**  
(1995- 2009)



Source: World Trade Organization and EIU Market Indicators Statistics.

For example, a 2004 AD investigation on wooden bedroom furniture from China provided an illustration of the possible effects of globalization on the willingness of U.S. industries to petition for trade remedies. The initiation of this case created a deep and vocal controversy in the U.S. furniture industry because some of the larger U.S. companies were importing some furniture lines from China while continuing domestic production of more high-end items. Many furniture retailer/manufactures reportedly objected to the case brought by furniture industry petitioners because they feared that the higher prices caused by possible AD duties would depress sales and result in the layoffs of retail employees. Furniture makers and unions supporting the investigation countered that far more manufacturing jobs were being lost than would have been lost on the retail side.<sup>67</sup> The debate was so heated that the ITA took the unusual step of polling the industry to determine whether there was sufficient industry support for the petition, which resulted in a

<sup>67</sup> Becker, Denise. "Government Delays Ruling on Tariffs; the Furniture Industry Must Wait Until June 17 for Action, if Any, on China," *Greensboro News and Record*, April 13, 2004.

finding that only slightly more than half of the industry approved.<sup>68</sup> AD duties ranging from 2.3% to 198.08% were ultimately imposed on the targeted merchandise.<sup>69</sup>

Some observers have also acknowledged that the expansion of multinational corporations with operating plants all over the world could play a role in the apparent decline of trade remedy actions. For example, the largest steel manufacturer in the United States, for example, is now ArcelorMittal USA, a subsidiary of a global firm based in Luxembourg.<sup>70</sup> Since these multinational firms often import goods from foreign subsidiaries to fill out U.S. product lines, they might be less inclined to favor trade remedy actions.

A third reason that trade remedy initiations have declined in recent years may be related to the growth rate of the world economy. As **Figure 3** also illustrates (see GDP Growth, right scale), AD and CVD petitions have historically tended to increase during periods of economic recession and decrease during growth periods. The increase in AD initiations in 2008 (and concurrent increases in CVD and safeguard initiations), then, could partially be a reflection of economic pressures facing industries as a result of the global economic crisis of 2008-2009.

Some economists have observed, however, that the worldwide increase in AD initiations in 2008 was not as great as might have been expected, or may have been brought about by reasons other than the crisis.<sup>71</sup> At the same time, for countries that created new policy initiatives to assist domestic industries during the crisis, trade remedy actions, along with stimulus packages and bailouts, may have been among the policy tools brought into play.<sup>72</sup>

## U.S. AD/CVD Disputes in WTO

### Antidumping Act of 1916

The earliest U.S. antidumping measure, the Antidumping Act of 1916,<sup>73</sup> made it unlawful to systematically import articles into the United States at prices substantially lower than the actual market value or wholesale price of the imports *with the intent* of destroying or injuring a domestic industry in the United States. The statute assigned criminal penalties and provided for a civil award of triple damages to the injured party. A WTO dispute resolution panel and the Appellate Body found that the law provided penalties not authorized by the Antidumping Agreement or the GATT, and therefore violated U.S. WTO obligations. Congress repealed the law in Section 2006 of the Miscellaneous Tariff and Technical Corrections Act of 2004 (P.L. 108-429).

<sup>68</sup> 19 U.S.C. 1617a(c)(4) in the case of CVD investigations, and 19 U.S.C. 1673a(c)(4) in the case of AD investigations, require that Commerce determine if the petition has been filed by or on behalf of the industry. Telephone interview with Commerce officials, June 24, 2004.

<sup>69</sup> Department of Commerce, ITA. Wooden Bedroom Furniture from China. Fact Sheet, December, 28, 2004.

<sup>70</sup> Comments of panelists at Washington International Trade Association (WITA) event, "Trade Remedies: What is Changing, and How?," November 20, 2008.

<sup>71</sup> Bown, Chad P., *Taking Stock of Antidumping, Safeguards, and Countervailing Duties, 1990-2009*, World Bank, Development Research Group, Policy Research Working Paper 5436, September 2010, p. 21. Bown also points out that a review of developing country AD and CVD data from the 2007-2009 time period indicates that the increase could have been part of a longer-term trend in trade remedy use and thus unrelated to the crisis.

<sup>72</sup> *Ibid.*, p. 20.

<sup>73</sup> 15 U.S.C. 72.

## Continued Dumping and Subsidy Offset Act

Section 1003 of P.L. 106-387, the “Continued Dumping and Subsidy Offset Act (CDSOA) of 2000,” amended the Tariff Act of 1930 by requiring that all duties collected as a result of AD and CVD orders be redistributed to the petitioners (“affected domestic producers”) that have been injured by the subject imports. The funds must be used for certain “qualifying expenditures,” including employee training, research and development, manufacturing facilities, or equipment. Disbursements under the act amounted to \$231 million in FY2001, \$330 million in FY2002, \$190 million in FY2003 (an additional \$50 million was held in reserve pending the resolution of a court case), \$284 million in FY2004, \$226.1 million in FY2005, \$380.1 million in FY2006, \$295 million in FY2007, \$190 million in FY2008, and \$248 million in FY2009.<sup>74</sup>

The CDSOA was controversial for several reasons. First, opponents believed that the measure encouraged the filing of AD and CVD petitions, limited the benefits of collections under the act to petitioners (placing other domestic producers at a competitive disadvantage), and exacerbated market inefficiencies that may have been caused by AD and CVD actions. Second, some opponents found it controversial because it was inserted into the legislation during conference and received no committee or floor consideration in either House. Supporters, including many in Congress and certain domestic industry representatives, believed that money distributed through the CDSOA was a relatively small amount to invest in assisting U.S. companies to remain competitive.

WTO dispute settlement and Appellate Body panels determined that the law violated U.S. obligations under the WTO Antidumping and Subsidies Agreements. The level of retaliation was determined through arbitration, and most of the co-complainants in the case, including the European Union, India, Japan, and Korea, received formal WTO authorization to “suspend concessions” on targeted U.S. goods in late November 2004. Canada began assessing additional tariffs on U.S. exports of live swine, cigarettes, oysters, and specialty fish in May 2005.<sup>75</sup> The European Union established an additional 15% tariff on imports of certain women’s apparel, office supplies, crane trucks, sweet corn, and spectacle frames, also beginning on May 1, 2005.<sup>76</sup> Mexico began retaliating in a similar manner on August 17, 2005, and Japan on September 1, 2005.<sup>77</sup> According to WTO agreements, any retaliation is temporary, and may only occur if “recommendations and rulings are not implemented in a reasonable period of time.”<sup>78</sup>

The CDSOA was repealed as of February 8, 2006 in section 7601 of P.L. 109-171, the Deficit Reduction Act of 2005. The repeal language specified, however, that “all duties on entries of goods made and filed before October 1, 2007 ... shall be distributed as if [the CDSOA] had not been repealed.”<sup>79</sup>

Industries still continue to receive CDSOA disbursements for several reasons. First, the almost two-year time difference between the repeal and the actual statutory date for the end of

<sup>74</sup> U.S. Department of Homeland Security. U.S. Customs and Border Protection. CDSOA Annual Reports, various years. [http://www.customs.gov/xp/cgov/import/add\\_cvd/](http://www.customs.gov/xp/cgov/import/add_cvd/).

<sup>75</sup> Canada Department of Foreign Affairs and International Trade. “Byrd Amendment: Canada to Retaliate Against United States,” United States,” News Release No. 56, March 31, 2005.

<sup>76</sup> Commission on the European Communities. *Proposal for a Council Regulation Establishing Additional Customs Duties on Imports of Certain Products Originating in the United States of America*. Brussels, March 31, 2005.

<sup>77</sup> World Trade Organization. Dispute Settlement Body. *Minutes of Meeting on 31 August 2005*, September 30, 2005, WT/DSB/M/196.

<sup>78</sup> World Trade Organization. *Understanding on Rules and Procedures Governing the Settlement of Disputes*, Article 22:1.

<sup>79</sup> Section 7601(b) of P.L. 109-171.



distributions allowed additional disbursements to continue. Second, AD and CV duties are not assessed until the product “entry” is actually liquidated (as opposed to being stored in a bonded customs warehouse) and the goods subsequently enter the commerce of the United States. Third, AD and CVD duties are applied retrospectively—meaning that Customs and Border Protection (CBP) does not collect the payment for these duties until long after the goods have entered U.S. commerce. In many cases, AD and CV duty payments are collected more than a year after liquidation (and can be collected much later if the trade remedy action is disputed in court). Fourth, CDSOA payments are disbursed early (within 60 days) in the fiscal year following the date they are received. Since duties are collected and distributed in this fashion, the petitioners and industry supporters are likely to continue receiving CDSOA payments for some time.

CDSOA disbursements were further affected by Section 822 of P.L. 111-291, the Claims Resolution Act of 2010, enacted on December 8, 2010, as amended. This law, enacted as a funding offset, provided that no CDSOA payments may be distributed on entries of any goods that, on the date of enactment are: (1) not liquidated; and (2) not in litigation and not under an order of liquidation from the Commerce Department.<sup>80</sup> On May 27, 2011, CBP announced that “the full impact of the CDSOA repeal on distributions may be delayed for several years,” due to the way that AD and CVD payments are collected, but that “the amount of money available for distribution can be expected to diminish over time.”<sup>81</sup>

The European Union, Canada, Mexico, and Japan indicated that they would continue to retaliate against CDSOA disbursements until they actually cease.<sup>82</sup> The European Union and Japan are currently still imposing monetary sanctions on some U.S. products.

## Zeroing

“Zeroing” is an administrative practice used in the calculation of dumping margins. In U.S. law, AD orders imposed on targeted merchandise must be equal to the dumping margin or “the amount by which the normal value exceeds the export price or constructed export price of the subject merchandise.”<sup>83</sup> The ITA typically calculates the margin by first identifying, to the extent possible, all U.S. transactions, sale prices, and levels of trade for each model or type of targeted merchandise sold by each company in the exporting country. These model types are then aggregated into subcategories, known as “averaging groups,” which are used to calculate the “weighted average export price.” The export prices for each subgroup are then compared to the corresponding agency-calculated “weighted average normal value.” Finally, the results of all of these comparisons are added up to establish the overall dumping margin of the targeted product.<sup>84</sup>

When authorities add up the dumping margins of each of the subgroups to establish an overall dumping margin for the subject merchandise, they sometimes encounter negative margins in a subgroup (an indicator that the items in that subcategory not being dumped). However, rather

<sup>80</sup> The statute had originally stated that the covered entries must be (1) not liquidated; and (2) not in litigation or not under an order of liquidation from the Department of Commerce. Section 504 of P.L. 111-312, the Tax Relief, Unemployment Insurance Authorization, and Job Creation Act of 2010, changed the word “or” to “and” and made the amendment effective as if included in the earlier enactment.

<sup>81</sup> 76 *Federal Register* 31020.

<sup>82</sup> World Trade Organization. Dispute Settlement Body. *Minutes of Meeting on 17 February 2006*, March 31, 2005, WT/DSB/M/205.

<sup>83</sup> 19 U.S.C. 1677f-1(d)(A)(i) and (ii).

<sup>84</sup> See Department of Commerce, Import Administration. Antidumping Manual, Chapter 6, “Fair Value Comparisons.” 1997 edition <http://ia.ita.doc.gov/admanual/index.html>.

than including the negative margin in their calculations, which could result in a lower overall dumping margin, ITA officials factor in the results of that subgroup as a zero.<sup>85</sup> Officials use a similar practice when recalculating dumping margins in administrative reviews of AD orders or suspension agreements. One justification for the zeroing practice is that the dumping margin could be skewed if, when determining the weighted average dumping margin, the subgroup that has the negative dumping margin represents a substantial percentage of export sales.

The U.S. practice has been challenged in the WTO on a number of fronts. In these disputes, WTO dispute settlement and Appellate Body panels have found that the U.S. practice of zeroing is in violation of its obligations under the WTO Antidumping Agreement.<sup>86</sup> For example, in February 6, 2004, the European Union formally requested the establishment of a dispute settlement panel on zeroing, citing 31 U.S. AD cases targeting products of the EU. The EU claimed that the dumping margin would have been minimal, or even negative, if U.S. officials had not used zeroing. A panel was established on March 19, 2004. In a split decision in late October 2005, the dispute settlement panel report found for the United States in its use of zeroing in the course of administrative reviews, but against U.S. practice when conducting initial investigations.<sup>87</sup> On April 18, 2006, the Appellate Body found that the practice of zeroing could be challenged as it relates to original investigations, and upheld the panel's finding that the practice is inconsistent with Article 2.4.2 of the Antidumping Agreement.<sup>88</sup>

As a result of this and other WTO disputes against the United States, zeroing has been found to be broadly prohibited in the calculation of duties in antidumping proceedings.<sup>89</sup> Since WTO rulings have challenged a U.S. administrative practice rather than U.S. statutes, the practice may not necessarily require legislative action to implement. In the first dispute mentioned above, the United States told the DSB in May 2006 that it intended to implement the recommendations and rulings of the panels. On February 22, 2007, the ITA initiated proceedings under section 129 of the Uruguay Round Agreements Act (URAA). The ITA recalculated the weighted-average dumping margins in twelve of the fifteen EU cases found to violate WTO rules (three of the AD orders had been previously revoked). The final recalculated dumping margins for eleven of the cases were announced on May 1, 2007,<sup>90</sup> but the implementation of the finding in the twelfth case was delayed due to a clerical error in the underlying investigation.<sup>91</sup> The ITA also announced that it would “no longer make average-to-average comparisons in original antidumping duty investigations without providing offsets for non-dumped comparisons.”<sup>92</sup>

<sup>85</sup> Ibid.

<sup>86</sup> World Trade Organization, Dispute Settlement Body. *United States—Laws, Regulations, and Methodology for Calculating Dumping Margins (“Zeroing”)*. Request for the establishment of a panel by the European Communities, WT/DS294/7, February 6, 2004. Ruling of the Panel distributed October 31, 2005. Available at <http://docsonline.wto.org/>. See also Appellate Body Report, *United States—Laws, Regulations and Methodology for Calculating Dumping Margins (“Zeroing”)*, WT/DS294/AB/R (April 18, 2006).

<sup>87</sup> Ibid.

<sup>88</sup> Ibid.

<sup>89</sup> CRS Report RL32014, *WTO Dispute Settlement: Status of U.S. Compliance in Pending Cases*, by Jeanne J. Grimmett.

<sup>90</sup> International Trade Administration. “Final Results for Section 129 Determinations,” <http://ia.ita.doc.gov/ia-highlights-and-news.html>.

<sup>91</sup> International Trade Administration, “Issues and Decision Memorandum for the Final Results of the Section 129 Determination,” April 9, 2007. <http://ia.ita.doc.gov/download/zeroing/zeroing-sec-129-final-decision-memo-20070410.pdf>.

<sup>92</sup> 72 *Federal Register* 9306, March 1, 2007.

In a Federal Register notice published on December 28, 2010, the ITA requested public comments to revise its regulations regarding the calculation of the weighted average dumping margin in reviews to “provide offsets for non-dumped comparisons while using monthly average-to-average comparisons in a manner that parallels the WTO-consistent methodology the Department currently applies in original investigations.”<sup>93</sup> The end of the public comment period, originally scheduled for January 27, 2011, was extended by the ITA to February 18, 2011.<sup>94</sup>

## Safeguard (Escape Clause) Measures

“Safeguard” or “escape clause” trade laws are designed to provide domestic industries with relief from injurious import surges resulting from fairly competitive trade. In order to obtain relief, the USITC must determine that a domestic industry is substantially injured by import surges. Presidential action is necessary to obtain relief under these statutes.

Although individual U.S. safeguard actions (in particular, the 2002 action on steel) have been the subject of intense debate, on the whole, many economists find safeguard measures less objectionable than AD or CVD actions. Some reasons for this include their temporary nature, the requirement that industries take steps to positively adjust to import competition, the higher injury threshold, and the requirement of Presidential action.<sup>95</sup>

### Statutory Authority

Sections 201-204 of the Trade Act of 1974, as amended,<sup>96</sup> provide relief for imports from all countries. Investigations under this statute are often known as “section 201 investigations.” Section 406 of the same Act, as amended,<sup>97</sup> provides a similar relief for market-disruptive imports from communist countries. Section 421, added to the Trade Act of 1974 in October 2000,<sup>98</sup> is a country-specific trade remedy that applies only to injurious imports from China. Another provision, Section 302 of the NAFTA Implementation Act,<sup>99</sup> provides similar relief due to injurious imports originating in Canada or Mexico.

### Section 201 Eligibility Criteria

A Section 201 investigation may be initiated by the filing of a petition by any group considered to be representative of an industry, including a trade association, firm (especially if the firm is the sole domestic producer), a certified or recognized union, or group of workers.<sup>100</sup> An investigation may also be initiated at the request of the President, the United States Trade Representative (USTR), the House Ways and Means or Senate Finance Committees, or by the USITC itself.<sup>101</sup>

<sup>93</sup> 75 *Federal Register* 81533.

<sup>94</sup> 76 *Federal Register* 5518.

<sup>95</sup> Lawrence, Robert Z. and Litan, Robert E. *Saving Free Trade: A Pragmatic Approach*, Washington, D.C.: Brookings, 1986, p. 97.

<sup>96</sup> 19 U.S.C. 2251-2254.

<sup>97</sup> 19 U.S.C. 2436.

<sup>98</sup> 19 U.S.C. 2451, as added by section 103 of P.L. 106-286, Division A, Normal Trade Relations for the People’s Republic of China.

<sup>99</sup> 19 U.S.C. 3352.

<sup>100</sup> 19 U.S.C. 2252(a)(1).

<sup>101</sup> 19 U.S.C. 2252(b)(1)(A).

The ultimate goal of a section 201 action is to facilitate a domestic industry's positive adjustment to import competition. The petition for relief must also include a statement describing specific purposes for which the action is being sought (e.g., to allow time for the domestic industry to transfer its resources into other productive pursuits) and may include a plan submitted by the petitioner to facilitate the industry's positive adjustment to import competition (if a plan is not filed with the petition, it must be filed within 120 days).

Section 201 relief may apply to imports of the targeted merchandise from all countries or from any country or countries specifically identified as a cause of the import surges.

## U.S. International Obligations

Article XIX of the GATT, Emergency Action on Imports of Particular Products, authorizes contracting parties to "suspend the obligation in whole or in part or to modify the concession" in the event of "unforeseen developments" caused by obligations or tariff concessions under the Agreement.<sup>102</sup> The WTO Safeguards Agreement provides rules for the application of Article XIX. Under the Agreement, safeguard measures are considered "emergency" actions with respect to imports of particular products. WTO provisions require that safeguard measures: (1) be time-limited; (2) be imposed only when imports are found to cause or threaten serious injury to a competing domestic industry; and (3) be applied on a non-selective (i.e., most-favored-nation) basis; and (4) be progressively liberalized while in effect. In addition, the Member imposing a safeguard is expected to maintain a substantially equivalent level of concessions between it and exporting Members affected by the safeguard. To achieve this, Members may agree on compensation; if negotiations fail, the exporting Member may, in certain circumstances, suspend concessions *vis à vis* the Member imposing the safeguard.

## NAFTA Provisions

Article 8 of the NAFTA allows any party subject to the agreement to use bilateral (within the NAFTA) "emergency actions" if an import surge or a duty reduction is a substantial cause of serious injury to a domestic industry. Consultations between affected parties are required. The remedy allowed is a suspension in the further reduction of a duty, or an increase in the rate of duty at a level not to exceed: (1) the most-favored-nation (MFN) applied rate of duty in effect at the time the action is taken; or (2) the MFN-applied rate of duty in effect on the day immediately preceding the date of entry into force of the NAFTA. In the case of seasonal products, the duty rate applied cannot exceed the MFN applied rate of duty that was in effect on the good for the corresponding season immediately preceding the date of entry into force of the NAFTA. For most products, the term of a safeguard action may not last more than three years.

Each party to the NAFTA also retains the right to engage in global safeguard actions under Article XIX of the GATT, but must exclude other parties to the NAFTA unless: (1) imports from a party, considered individually, account for a substantial share of the imports; and (2) imports from a party, considered individually, or in extreme circumstances, collectively, contribute importantly to the injury, or threat thereof, caused by imports. Proposed emergency actions are not subject to dispute settlement proceedings under the NAFTA.

Safeguard provisions are also included in other FTAs to which the United States is a party.

<sup>102</sup> General Agreement on Tariffs and Trade, Article XIX.1(a) and (b).

## Section 201 Safeguard Investigations

### USITC Role

The USITC determines whether the targeted merchandise is being imported in such increased quantities that it is a “substantial cause of serious injury, or threat of serious injury”<sup>103</sup> to the domestic industry producing articles “like or directly competitive with” the imported article.<sup>104</sup> The USITC must normally make its injury determination within 120 days, but it may take up to 30 additional days to make a determination if the investigation is extraordinarily complicated. If the USITC determines affirmatively, it also provides the President with one or more remedy recommendations. The USITC’s report must be submitted to the President within 180 days of the petition, or within 240 days if critical circumstances are alleged.<sup>105</sup>

### *Provisional Relief*

If critical circumstances are alleged to exist and the petitioner requests that provisional relief be provided, the USITC must make a determination on critical circumstances within 60 days of receiving the petition. If the critical circumstances determination is affirmative, the USITC must also suggest a recommended amount of relief (preference is given to increasing or imposing a duty on imports) to prevent or remedy the injury. The USITC must immediately report its findings to the President.<sup>106</sup>

Within 30 days of receipt of an affirmative determination from the USITC, if the President finds that provisional relief is warranted, he may proclaim whatever provisional relief he believes necessary for a period not to exceed 200 days.<sup>107</sup>

### *Perishable Products*

Provisional relief may also be requested if the targeted merchandise is a perishable agricultural or citrus product. In these cases, the industry representative files a request with the USTR (in advance of a section 201 petition) for monitoring of imports of the product. The USTR determines (within 21 days) (1) if the imported product is a perishable agricultural or citrus product and (2) if there is a reasonable indication that the product is being imported in such increased quantities as to be, or likely to be, a substantial cause of serious injury, or threat of serious injury, to the domestic industry. If these determinations are affirmative, the USTR requests the USITC to monitor and investigate the imports for a limited time period, not to exceed two years.<sup>108</sup>

In order to receive provisional relief, the perishable product must be the subject of USITC monitoring for at least 90 days prior to initiation of the investigation, and the petitioner must request provisional relief. The USITC has 21 days to make an injury determination, and immediately reports its findings and remedy recommendations to the President. If the USITC

<sup>103</sup> “Substantial cause” is defined in 19 U.S.C. 2252(b)(1)(B) as “a cause which is important and not less than any other cause.” Criteria for assessing “serious injury” are described in 19 U.S.C. 2252(c)(1)(A).

<sup>104</sup> 19 U.S.C. 2252(c).

<sup>105</sup> 19 U.S.C. 2252(f)(1).

<sup>106</sup> 19 U.S.C. 2252(d)(1)(E) and (F).

<sup>107</sup> 19 U.S.C. 2252(d).

<sup>108</sup> 19 U.S.C. 2252(d)(1)(B) and (C).

makes an affirmative determination, the President has seven days to proclaim provisional relief if he considers it necessary to prevent or remedy the serious injury. If the USITC's determination is negative, no relief is given and the proceeding is terminated.<sup>109</sup>

## Presidential Action

Within 60 days of receipt of an affirmative USITC determination and report, the President is instructed to "take all appropriate and feasible action within his power which the President determines will facilitate efforts by the domestic industry to make a positive adjustment to import competition and provide greater economic and social benefits than costs." On this basis, the President may: (1) implement the USITC's recommendations; (2) modify the USITC provisions or provide another form of remedy; or (3) take no action due to U.S. economic or national security interests.<sup>110</sup>

Import relief may be granted for an initial period of up to four years and extended one or more times.<sup>111</sup> The total period of relief, however, may not exceed eight years. If the President decides not to provide relief, or to provide relief other than that recommended by the USITC, his decision may be overridden by a congressional joint resolution (adopted within 90 days), in which case the USITC's recommendations would be implemented.<sup>112</sup>

## Midterm Review

The USITC is required to monitor section 201 actions as long as they stay in effect, especially with respect to the efforts and progress of the domestic industry and workers to adjust positively to import competition.<sup>113</sup> If the initial period of the action exceeds three years, the USITC is also required to submit a midterm review to the President and Congress. The USITC holds a hearing in which any interested parties may participate, and upon request, advises the President of the probable economic impact of any reduction, modification or termination of the action.<sup>114</sup>

After the President receives the USITC review and seeks the advice of the Secretary of the ITA and the Secretary of Labor, he may modify, reduce, or terminate the action if he determines that changed circumstances warrant such actions either because: (1) the domestic industry has not made adequate efforts to adjust positively to import competition; or (2) the effectiveness of the action has been impaired by changed economic circumstances. He may also terminate, modify, or reduce the action if the majority of industry representatives petition the President to do so on the basis of positive adjustment to import competition.<sup>115</sup>

The President may also extend an action. Between six and nine months before the safeguard action is scheduled to terminate, at the request of the President or if an industry petition is filed, the USITC must investigate to determine whether an extension of the action is necessary and if the domestic industry is making positive adjustment to import competition. Within 60 days of the

<sup>109</sup> 19 U.S.C. 2252(d)(1)(A).

<sup>110</sup> 19 U.S.C. 2253.

<sup>111</sup> 19 U.S.C. 2253(e)(1)(A) and (B).

<sup>112</sup> 19 U.S.C. 2253(c).

<sup>113</sup> 19 U.S.C. 2254(a)(1).

<sup>114</sup> 19 U.S.C. 2254(a)(2) and (3).

<sup>115</sup> 19 U.S.C. 2254(b).



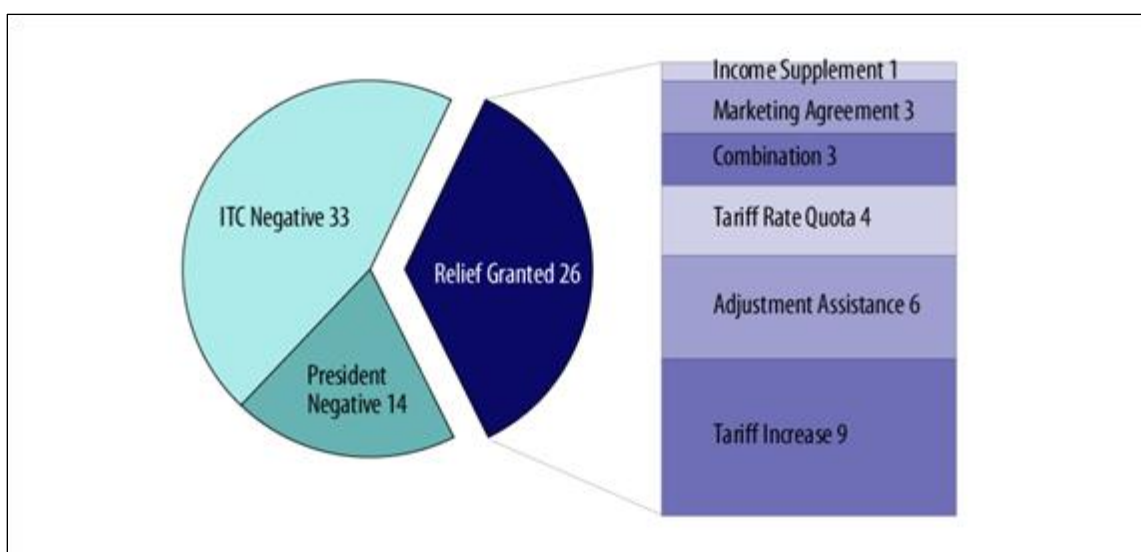
termination date, the USITC must transmit the results of the investigation and its determination, unless the President specifies a different date.<sup>116</sup>

### Section 201 Outcomes

In the seventy-three section 201 safeguard investigations conducted from 1975 to date, the USITC has recommended some form of relief 47% of the time. The President has provided import relief in 26 instances (35.6%).

**Figure 4** illustrates the outcome of section 201 cases from FY1975 to the present. In the cases in which the President granted relief, the most common form has been tariff increases, followed by adjustment assistance, tariff rate quotas, or some combination thereof.

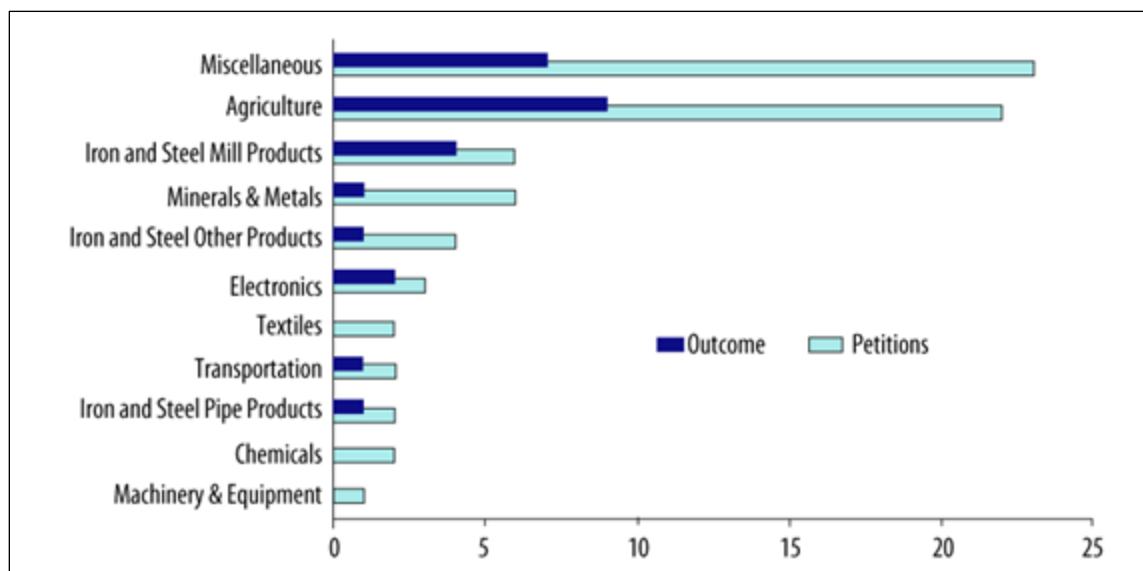
**Figure 4. Outcome of Safeguard (Section 201) Cases, 1975-Present**



Source: USITC.

<sup>116</sup> 19 U.S.C. 2254(c).



**Figure 5. Safeguard (Section 201) Petitions and Outcome by Product Group**

Source: USITC.

**Figure 5** shows Section 201 safeguard petitions from 1975 to date and their outcomes by product group. The largest number of petitions has been filed in the category of miscellaneous manufactures, such as footwear, stainless steel flatware, fishing tackle, fishing rods, and clothespins. Agricultural products are the second largest category, including asparagus, mushrooms, shrimp, honey, roses, and cut flowers. It appears, generally, that a greater percentage of domestic producers of end-use consumer goods have filed and obtained relief through safeguard petitions as opposed to AD or CVD orders.

## 2002 Steel Safeguard Action

On June 5, 2001, President Bush responded to steel companies, union representatives, and many in Congress by requesting that the USITC begin a broad section 201 investigation on steel import surges. The request, covering more than 500 steel mill products, was forwarded to the USITC by then-USTR Robert Zoellick on June 22. The USITC staff grouped this large number of products into 33 product categories under four broad groupings. For each of these 33 categories, the USITC investigated whether or not imports of the subject merchandise were a substantial cause of serious injury to the domestic steel industry.

On September 17, 2001, the USITC began a series of hearings on the issue of injury to the domestic steel industry, and on October 22, 2001, made an affirmative determination in 16 of the 33 product categories. Products in the remaining 17 categories were dismissed from further consideration. The USITC continued the remedy phase of the investigation for the 16 categories, and held hearings in November 2001. On December 19, 2001, the USITC submitted its findings and remedy recommendations to the President.<sup>117</sup> On March 5, 2002, President Bush announced

<sup>117</sup> All public documents regarding the ITC steel investigation are available on the ITC website, [http://www.usitc.gov/trade\\_remedy/731\\_ad\\_701\\_cvd/investigations/2003/204\\_steel/finalphase.htm](http://www.usitc.gov/trade_remedy/731_ad_701_cvd/investigations/2003/204_steel/finalphase.htm).

trade safeguard remedies for all products that the USITC had found substantial injury, except for two steel specialty categories.<sup>118</sup>

The President's implementation of safeguard measures on steel was controversial both domestically and internationally. A number of U.S. trading partners challenged the decision through the WTO, and on July 11, 2003, the dispute settlement panel found that the safeguard measures were inconsistent with U.S. WTO obligations.<sup>119</sup> An Appellate Body determination confirmed the main points of the panel decision on November 10, 2003.<sup>120</sup> After the WTO panel rulings, the European Union announced that it would retaliate by establishing substantial tariff penalties against \$2 billion in imports from the United States beginning in December 2003.

On December 8, 2003, the President terminated section 201 safeguard measures on steel.<sup>121</sup> The USTR stated that the termination was the result of a midterm review of the progress of the steel industry to cope with the increased competition and changed economic circumstances. The United States faced retaliation from the European Union equivalent to \$2.2 billion in increased tariffs on U.S. exports due to WTO dispute settlement and Appellate Body findings. In the proclamation, the President continued the licensing and monitoring of imports of certain steel products and delegated the function to the Secretary of the ITA.<sup>122</sup>

## Section 406 Relief

Section 406 of the Trade Act of 1974,<sup>123</sup> as amended, was established to provide a remedy against market disruption<sup>124</sup> caused by imports from Communist countries. This statute applies to any Communist country, whether or not it has received non-discriminatory (normal trade relations) treatment. This provision was enacted out of concern that trade remedy laws already in place were insufficient to deal with a rapid influx of imports that can result from a Communist government's control of its industry pricing levels and distribution processes.<sup>125</sup> Section 406 investigations follow a similar format to section 201 proceedings, however, the standard of injury (market disruption as opposed to "substantial cause of serious injury" or threat thereof) is lower; and domestic industries are not required to plan for or demonstrate positive adjustment to import competition. Import relief may apply only to imports from the subject Communist country or countries. If the President decides to grant relief, he may do so for up to five years, with a possible additional three-year extension.

<sup>118</sup> To Facilitate Positive Adjustment to Competition from Certain Steel Products, Proclamation 7529, March 5, 2002, 67 F.R. 10593.

<sup>119</sup> World Trade Organization, *United States-Definitive Safeguard Measures on Certain Steel Products*, Final Reports of the Panel, DS248 [among others], July 2003.

<sup>120</sup> World Trade Organization, *United States-Definitive Safeguard Measures on Certain Steel Products*, Report of the Appellate Body, DS248 [among others], November 2003.

<sup>121</sup> To Provide for the Termination of Action Taken With Regard to Imports of Certain Steel Products, Proclamation 7741, December 4, 2003, 68 F.R. 68481.

<sup>122</sup> *Ibid.*

<sup>123</sup> 19 U.S.C. 2451.

<sup>124</sup> Market disruption exists, according to the statute, whenever imports of a product increase rapidly, "so as to be a significant cause of material injury, or threat thereof, to such domestic industry." (19 U.S.C. 2436(e)(2)(A)).

<sup>125</sup> U.S. Congress, Senate Committee on Finance, *Trade Act of 1974*, report to accompany H.R. 10710, 93<sup>rd</sup> Cong., 2<sup>nd</sup> sess., December 13, 1974, S. Report. 93-1298 (Washington: GPO, 1974).

## “Surge Protection” from Chinese Imports (Section 421)

A country-specific safeguard on imports from China is found in section 421 of the Trade Act of 1974.<sup>126</sup> This provision, enacted in section 103 of P.L. 106-286, superseded section 406 with respect to goods from China after the President extended permanent nondiscriminatory (normal trade relations) treatment to China following its accession to the WTO.<sup>127</sup> The legislation implemented an anti-surge mechanism established under the U.S.-China Bilateral Trade Agreement, concluded on November 15, 1999. This transitional safeguard measure is scheduled to terminate 12 years after China’s WTO accession.

According to the Protocol on the Accession of China to the WTO, import relief may be granted “only for such period of time as may be necessary to prevent or remedy the market disruption.” If import relief is granted due to a *relative* increase in imports, China may retaliate by suspending equivalent trade concessions or obligations if the measure remains in effect for more than two years. If relief is granted due to an *absolute* increase in imports, China may retaliate after three years.<sup>128</sup>

Although the procedure under section 421 action is similar to that under section 201, the section 421 safeguard is different in four major respects: (1) the statute provides relief for subject merchandise from China only, whereas the remedy in section 201 applies to subject imports from all countries; (2) consultations with Chinese trade authorities are required; (3) in addition to the USITC, the USTR takes part in the procedure and also submits recommendations to the President; and (4) the standard for relief is “market disruption”—a lower standard than in section 201 proceedings.

To date, there have been seven section 421 investigations completed, as follows: Pedestal Actuators (USITC case number TA-421-1); Wire Hangers (TA-421-2); Brake Drums and Rotors (TA-421-3); Ductile Iron Waterworks Fittings (TA-421-4); Uncovered Innerspring Mattress Units (TA-421-5); Circular Welded Non-Alloy Steel Pipe from China (TA-421-06); and Certain Passenger and Light Truck Vehicle Tires (TA-421-7). The USITC made affirmative determinations in five of these cases and negative determinations in two cases (brake drums and rotors and innerspring mattress units). In each of the four cases in which the USITC made affirmative determinations during the Bush Administration, the President decided not to grant relief because he determined that providing such relief was not in the national economic interest of the United States.<sup>129</sup>

## Tire Safeguard Imposed

On September 11, 2009, President Obama announced that he had decided to impose remedies on certain passenger and light truck vehicle tires from China, thus marking the first time that a section 421 safeguard was implemented. The remedy, effective September 26, 2009, imposes

<sup>126</sup> P.L. 93-618, Section 421, as added by section 103(a)(3) of P.L. 106-286, 19 U.S.C. 2451.

<sup>127</sup> To Extend Nondiscriminatory Treatment (Normal Trade Relations Treatment) to the Products of the People’s Republic of China, Proclamation 7616 of December 27, 2001, 67 F.R. 479.

<sup>128</sup> An *absolute* increase in imports is indicated if imports of the subject merchandise surged in one year and were very low or zero previous years. A *relative* increase means that the ratio of imports relative to domestic production has rapidly increased from one year to the next.

<sup>129</sup> These negative Presidential determinations were recorded in the *Federal Register* at 68 *Federal Register* 3157 (pedestal actuators), 68 *Federal Register* 23019 (wire garment hangers), 69 *Federal Register* 10597 (iron waterworks fittings), and 71 *Federal Register* 871 (steel pipe).

additional tariffs on tires imported from China for a three-year period, beginning with 35% *ad valorem* the first year, decreasing to 30% the second year, and 25% the third year.<sup>130</sup>

This decision by the President was announced after the USITC ruled in the affirmative in a section 421 investigation (USITC investigation TA-421-7). The suggested USITC remedy was an additional duty on the subject merchandise for a three-year period, beginning at 55% *ad valorem* the first year and decreasing 10% each year the duty is imposed. The USITC also proposed that adversely impacted workers and firms should receive expedited consideration of Trade Adjustment Assistance by Department of Labor and the U.S. Department of the ITA if the required petitions are filed (as provided for in section 1802 of P.L. 111-5).<sup>131</sup>

According to the section 421 statute, the USTR was required to make a recommendation to the President within 55 days of receiving the USITC's report, and the President had to determine whether to provide relief within 15 days of the USTR's recommendation.<sup>132</sup> The USTR held a hearing on this section 421 case on August 7, 2009.

## Conclusion

Many in Congress support trade remedy laws and actions because they can assist in mitigating the adverse effects of international trade on domestic industry, producers, and workers. Some key industries may currently be facing injury from increased import competition, which can lead to factory closures and loss of domestic manufacturing jobs. Some workers in the service sector are also feeling the effects of import competition due to increased offshore outsourcing. These factors, among others, are reasons that many in Congress support strengthening these laws and insist that the United States must preserve the ability to “rigorously enforce its trade laws” in international negotiations.

Others believe that trade remedy actions (the vast majority of which are AD or CVD investigations and orders) in and of themselves introduce inefficiencies in both domestic and international economies that result in decreased economic welfare. For example, some in Congress have become concerned about the additional costs accruing to U.S. producers who use imports of intermediate goods subject to AD and CVD orders in finished products, such as steel, to manufacture finished products such as automobiles and buildings. In addition, in a global trading environment in which many domestic manufacturers (makers of shoes and furniture, for example) also import a portion of their product lines, the distinctions between U.S. domestic producers and foreign exporters have become less clear.

Competitive advantage and a liberalized world trading system create both winners and losers in domestic economies. Acting on legislation in a manner consistent with previously agreed upon multilateral commitments, balancing that action with the need to regulate and minimize unfair trade practices, and assisting domestic import-competing industries to become more internationally viable presents Congress with policy challenges.

<sup>130</sup> The President, “Proclamation 8414 - To Address Market Disruption From Imports of Certain Passenger Vehicle and Light Truck Tires From the People's Republic of China,” 74 *Federal Register* 47861, September 11, 2009.

<sup>131</sup> U.S. International Trade Commission. *Certain Passenger Vehicles and Light Truck Tires from China*, Investigation Number TA-421-7. Publication 4085, July 2009.

<sup>132</sup> 19 U.S.C. 2451 (h) and (k).

## Appendix. Summary of U.S. Trade Remedy Laws

Statutory Authority	Purpose	Administering Agencies	Remedy
Countervailing Duty (CVD). Tariff Act of 1930, Title VII, as amended (19 U.S.C. 1671 et seq.)	To offset any unfair and injurious advantage that foreign manufacturers, producers, or exporters of a class or kind of merchandise might have over U.S. producers as a result of a foreign authority providing a financial contribution, any form of income or price support, or a payment to a funding mechanism to provide the above.	International Trade Administration of the Department of Commerce (ITA) U.S. International Trade Commission (USITC)	Countervailing duties are imposed when two conditions are met: (a) Commerce determines that the government of a country or public entity is providing, directly or indirectly, a countervailable subsidy with respect to the manufacture, production, or export of the subject merchandise; and (b) the USITC determines that a U.S. industry is injured, threatened with material injury, or that the establishment of an industry is materially retarded, due to imports of that merchandise.
Antidumping (AD). Tariff Act of 1930, Title VII, as amended (19 U.S.C. 1673 et seq.)	To offset any unfair and injurious advantage that a class or kind of foreign merchandise might have over a similar U.S. product as a result of the imported product being sold in the United States at less than fair market value (less than comparable goods are sold in the home market, or in other export markets).	ITA, USITC	Antidumping duties are imposed when two conditions are met: (a) the ITA determines that the foreign subject merchandise is being, or is likely to be, sold in the United States at less than fair value; and (b) the USITC determines that a U.S. industry is materially injured, threatened with material injury, or that the establishment of an industry is materially retarded, because that merchandise is imported.
Sections 201-204 of the Trade Act of 1974, as amended (19 U.S.C. 2251 to 2254)	Provides for investigations as to whether an article is being imported into the United States in such increased quantities to be a substantial cause of serious injury, or the threat thereof, to a domestic industry producing an article like or directly competitive with the imported article. Gives the President authority to withdraw or modify concessions and impose duties or other restrictions for a limited period of time on imports of any article which causes or threatens serious injury to the domestic industry producing a like or directly competitive article.	USITC, President	Action may be taken in the form of an increase in or imposition of a duty, a tariff-rate quota, a modification or imposition of a quantitative restriction, one or more appropriate measures of trade administration assistance, or a combination of these actions.
Section 406 of the Trade Act of 1974, as amended (19 U.S.C. 2436)	Provides for remedy against market disruption caused by imports from communist countries.	USITC, President	Action may be taken in the form of increased rates of duty or quantitative restrictions that will prevent or remedy the market disruption. Temporary emergency action may also be taken.

Statutory Authority	Purpose	Administering Agencies	Remedy
Section 421 of the Trade Act of 1974, as amended (19 U.S.C. 2451)	Provides for remedy against market disruption caused by imports from the Peoples' Republic of China	USITC, USTR, President	Action may be taken in the form of increased rates of duty or quantitative restrictions that will prevent or remedy the market disruption. Temporary emergency action may also be taken. Consultations with China are also required to attempt to resolve the market disruption.
Section 301 of the Trade Act of 1974, as amended (19 U.S.C. 2411 et seq.)	Provides for investigations into allegations that (1) foreign countries are denying rights or benefits under trade agreements or violating trade agreements to which the United States is a party; or (2) the act, policy, or practice of a foreign country is unjustifiable and burdens or restricts U.S. commerce. Section 301(a) requires mandatory action, if the USTR determines that the above conditions have occurred, unless the WTO has adopted a report, or a dispute resolution proceeding under any other trade agreement has found, that rights of the United States have not been violated, or the USTR finds <i>inter alia</i> that the country has agreed to eliminate the practice, or taking action would cause serious harm to U.S. national security. Section 301(b) provides for "discretionary action" if an act, policy, or practice of a foreign country is "unreasonable or discriminatory and burdens or restricts United States commerce."	USTR	Benefits of trade agreement concessions may be suspended, withdrawn, or prevented; or duties or other import restrictions may be imposed. Binding agreements with the foreign country to eliminate or phase out the action or restriction may also be entered into.
"Special 301." Section 182 of the Trade Act of 1974, as amended (19 U.S.C. 2242)	The USTR is required, no later than 30 days of release of the National Trade Estimates Report (NTE) to identify foreign countries that (1) deny adequate and effective protection of intellectual property; or (2) deny fair and equitable market access to U.S. persons that rely on intellectual property protection. The USTR is also required to determine which of these are priority foreign countries, that is, those with the most onerous or egregious practices.	USTR	The USTR is required to initiate Section 301 investigations with respect to priority countries or consult with the countries (unless he determines that an investigation would be detrimental to U.S. economic interests) and if possible, secure agreements for the elimination of barriers.

Statutory Authority	Purpose	Administering Agencies	Remedy
Section 337 of the Tariff Act of 1930, as amended (19 U.S.C. 1337 et seq.)	Declares unlawful unfair methods of competition and unfair acts in the importation or sale of articles. "Section 337" investigations most often involve intellectual property rights, including allegations of patent, trademark or mask work infringement. Other forms of unfair competition, such as misappropriation of trade secrets, false advertising, and violations of antitrust laws may also be asserted.	USITC	<p>The USITC may issue an exclusion order instructing Customs to bar the products at issue from entry into the United States.</p> <p>The USITC may also issue a cease and desist order against named importers and other violating parties to cease certain actions.</p> <p>Expedited relief in the form of temporary exclusion orders and temporary cease and desist orders may also be available in certain exceptional circumstances.</p> <p>The USITC's exclusion orders become effective within 60 days of issuance unless disapproved by the President for policy reasons.</p>
Trade Adjustment Assistance for Firms. Chapter 3 of Title II of the Trade Act of 1974 (19 U.S.C. 2431 et seq.) [Program was extended through December 31, 2013 by P.L. 112-40.]	Provides technical assistance to eligible firms which (1) apply to ITA for certification of eligibility; and (2) propose adjustment proposal that describes the firm's recovery strategy and type of technical assistance it is seeking.	ITA	Eligible firms may apply for technical assistance to implement recovery strategy.
Trade Adjustment Assistance for Workers. Chapter 2 of Title II of the Trade Act of 1974 (19 U.S.C. 2271 et seq.) [Program was extended by P.L. 112-40 until December 31, 2013.]	Provides trade adjustment assistance for eligible U.S. workers if (1) a group of workers or their certified or recognized union or representative files a petition with the Department of Labor's Office of Trade Adjustment Assistance for certification of eligibility; and (2) the individual worker is approved for benefits by the State agency administering benefits. The program expansion in P.L. 111-5 also expanded TAA to workers adversely affected by trade that results in a final AD, CVD, or safeguard determination.	USITC (in AD and CVD cases), Department of Labor (Labor), State agencies	Eligible workers may receive trade readjustment allowances, training and reemployment services, and relocation and/or job search allowances.

**Sources:** U.S. International Trade Commission. Summary of Statutory Provisions Related to Import Relief. USITC Publication 3125, August 1998. United States Code Annotated (USCA) Title 19, Customs Duties. U.S. Congress, House Committee on Ways and Means. Overview and Compilation of U.S. Trade Statutes (2005), WCMP 109-5.



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